United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 17,442

4-15

HORACE SIMPSON,

Appellant

v.

UNITED STATES

Appellee.

APPEAL FROM A JUDGMENT IN THE DISTRICT
COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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TABLE OF AUTHORITIES

STATEMENT OF QUESTIONS PRESENTED

(1) May a conviction stand in a case in which the Government has the burden of proof of the issue of sanity and the Court charges the jury in terms of "right and wrong" in the absence of any evidential foundation whatever with respect thereto?

(2) Does the Government sustain its burden of proof on the issue of sanity, where the only Government testimony is an expert witness whose opinion testimony is based upon factual material (1) not admitted by the defendant, (2) not material of the witness' own personal knowledge, and (3) not introduced into the record by other witnesses who did have personal knowledge?

(3) Did the Trial Judge give "appropriate instructions" to the jury on the weight of the expert's opinion, within the principles laid down by this Court in Jenkins v. United States?

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HORACE SIMPSON,	:	
	:	
Appellant,	:	
	:	
v.	:	NO. 17,442
	:	
UNITED STATES,	:	
	:	
Appellee.	:	

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was indicted by the Grand Jury of the District of Columbia on July 20, 1961 for the alleged offenses of Assault with a Dangerous Weapon and Assault with Intent to Kill. (J.A. 1)

Following trial before Honorable Richmond B. Keech, District Judge and a jury, appellant was found guilty on both offenses and was sentenced to Three to Nine Years imprisonment. (J.A. 44-5)

It is from this judgment and commitment that this appeal is taken in forma pauperis. Jurisdiction lies under Title 28 §1291, U.S. Code.

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction, and sentence thereon, upon indictments of the offenses of Assault with a Deadly Weapon and Assault with Intent to Kill.

The Government's evidence was prima facie sufficient to sustain a verdict of guilty of the offenses charged. (J.A. 4-17) The principal defense of the defendant was insanity. (J.A. 40) The Government properly assumed, under the Davis rule, the burden of proof of the defendant's sanity (J.A. 18) and the trial judge without objection placed this burden squarely on the Government in his charge (J.A. 41-3).

The only evidence offered by the Government to sustain that burden of proof was the testimony of Dr. Platkin of St. Elizabeth's Hospital. (J.A. 18-28) The propriety and sufficiency of that testimony is one of the two basic points on this appeal. It is exhaustively analyzed, infra, pages 14 to 19 .

Following the close of the testimony, the Court charged the jury. The charge was erroneous in two important respects. First, the Trial Judge deliberately included a "right and wrong" test as part of the definition of

"causal connection or relation" (J.A. 42), in the total absence of any testimony on the "right or wrong" point.

Second, the Trial Judge submitted the issue of sanity to the jury (J.A. 44), without the required "appropriate instructions" on the question of the weight to be assigned to the expert's testimony. The jury determined the issue in favor of the Government and brought in its verdict of guilty. (J.A. 44) Judge Keech entered judgment of conviction and sentenced the defendant to a term of Three to Nine Years. (J.A. 44-5). This appeal followed.

The writer of this Brief was appointed by this Court to represent the defendant-appellant and an order was entered allowing the appeal in forma pauperis.

STATEMENT OF POINTS

1. The Court erred in its charge to the jury by the inclusion of the "right and wrong" test in the absence of any factual support in the record.

2. The Court erred in permitting the jury to find that the Government's evidence on the issue of sanity was sufficient to carry the burden of proof beyond a reasonable doubt, and in omitting from its charge the required "appropriate instructions" on the weight to be given by the jury to the expert's opinion.

SUMMARY OF ARGUMENT

1. This Court, in Douglas and in McDonald, has ruled that it is proper for the Trial Judge to instruct the jury that it may consider the defendant's ability to distinguish between right and wrong as part of its study of the "product" aspect of mental disease. However, this is permissible only if there is testimony on this point in the record.

In the present case, the Trial Judge included a "right and wrong" test in his charge, in the total absence of any testimony on this point. This left an issue for the jury with no testimony or standards to guide it.

2. The Trial Judge properly placed the burden of proof of sanity upon the Government. The sole Government witness on sanity was Dr. Platkin of St. Elizabeth's. His testimony indicated that his opinion was not based on the proper standards fixed in the opinions of this Court, but was in actuality merely the collective opinion of a "staff conference" at St. Elizabeth's. Further, this opinion was bottomed upon a series of underlying opinions, examinations and tests, none of which were offered or introduced into evidence. All that was offered was Dr. Platkin's hearsay statement of what these underlying opinions, examinations and tests showed.

In addition, assuming the admissibility of this hearsay testimony, this Court has ruled in Jenkins that the Trial Judge must "appropriately instruct" the jury on the weight to be given to the expert's opinion, in the light of the circumstances. That is to say, the jury must be told that the experts opinion is to be judged, in part, on the extent to which he testifies on the basis of his own observations and the extent to which he relies upon the opinions, reports and tests of others which are not offered in evidence at the time he testifies. The Trial Judge gave no instructions of this kind.

ARGUMENT

I.

THE COURT ERRED IN INCLUDING THE "RIGHT AND WRONG" TEST IN ITS CHARGE ON THE ISSUE OF SANITY.

A. INTRODUCTION

The charge of the Trial Judge on the substantive questions of the offense itself and the sufficiency of the Government's evidence of the offense is not included in the Joint Appendix. It is wholly unnecessary on this appeal. Appellant makes no argument that this portion of the charge

was erroneous or that the evidence of offense was insufficient to sustain conviction.

The Joint Appendix includes only the portions of the charge that deal with the issue of sanity. (J.A. 40-4)

B. THE TRIAL JUDGE ERRONEOUSLY INJECTED A "RIGHT OR WRONG" TEST.

No objection is presented in this appeal to the basic statements of the court in its charge on sanity. Judge Keech properly placed the burden of proof upon the Government (J.A. 41,42,43) and he properly stated the general Durham rule. (Durham v. United States, 94 App.D.C. 228, 214 F.(2d) 862 (1954).) (J.A. 41-2) He then proceeded to elaborate, and correctly stated, the "but for" definition of "product" in the framework of the Douglas and Carter rule (Douglas v. United States, 99 App.D.C. 232, 239 F.(2d) 52 (1956); Carter v. United States, 102 App.D.C. 227, 252 F.(2d) 608 (1957) (J.A. 42).)

Had he stopped here, his definition of insanity could not have been successfully attacked. But, for some reason unexplained in the record, he proceeded to add a further "right and wrong" gloss to his charge on the definition of "product" in direct violation of the principles

stated in Judge Fahy's opinion in Douglas, supra.

In Douglas, Judge Fahy carefully pointed out that Durham had not arbitrarily excluded the doctrine of "right and wrong" or the doctrine of "irresistable impulse", which were the keystones of the pre-Durham era. As he put it (239 F.(2d) at p. 58):

> "In so holding, however, we did not purport to bar all use of the older tests; testimony given in their terms may still be received if the expert witness feels able to give it, and where a proper evidential foundation is laid a trial court should permit the jury to consider such criteria in resolving the ultimate issue 'whether the accused acted because of a mental disorder.' "
> (Emphasis supplied.)

In other words, the trial judge may properly include a discussion of "right and wrong" in his charge as part of his explanation to the jury of the meaning of "product" in the Durham rule. But, he may do this only if the expert witnesses have themselves testified in terms of "right and wrong", with respect to the accused. If the language in Douglas means what it says, it means that the trial judge may not mention "right and wrong" to the jury in the absence of expert testimony on that exact point.

The Government cannot argue in this case that the language of Douglas is ambiguous and that there may be more than one interpretation of that language. This is ex-

cluded by the per curiam opinion of this Court in McDonald v. United States, decided October 8, 1962. All nine members of this Court sat at the argument. Eight members concurred in the following statement (Slip opinion pages 8-9):

> "We think the jury may be instructed, provided there is testimony on the point, that capacity, or lack thereof, to distinguish right from wrong and ability to refrain from doing a wrong or unlawful act may be considered in determining whether there is a relationship between the mental disease and the act charged." (Emphasis supplied.)

There is no ambiguity here. The "right or wrong" instruction on "product" can be given only if there is testimony on the point. Obviously, it cannot be given if there is no testimony on the point.

Yet this is exactly what Judge Keech did in this case. The defendant produced no expert witness; the Government produced only Dr. Platkin. Dr. Platkin was never asked anything in "right and wrong" terms; he never used these words directly or indirectly in any form or synonym; there is absolutely no "evidential foundation" for a "right or wrong" charge.

Nevertheless, Judge Keech said (J.A. 42):

> "As an example of this causal connection or relation, if a person at the time of the

> commission of a crime is so deranged mentally that he cannot distinguish between right and wrong, or, being able to tell right from wrong, he is unable by virtue of his mental derangement to control his actions, then his act is the product of his mental derangement." (Emphasis supplied.)

A clearer violation of Douglas is hard to conceive.

We submit that the Government should not be permitted to argue that this Court should waive aside this point and disregard this part of the charge as a harmless aberration of the trial judge. This is much more serious error in the charge than the error which warranted reversal in Blocker v. United States, 110 App.D.C. 41, 288 F.(2d) 853 (1961). In Blocker, the trial judge gave three separate charges on the burden of proof, two of them correct, and the one in the center incorrect. Yet this Court held that, even though the final charge was accurate, the error created by the second charge had not been overcome and that the inevitable confusion of the jury required a new trial.

Here the trial judge introduced into the case an issue which was excluded by the Douglas and McDonald rule, in a framework which could only create the most profound confusion in the minds of the jury without any ameliorating additional or other comment. What must the jury have thought about the injection of "right or wrong" into their

deliberations? They had not heard one word about this from Dr. Platkin or any other witness, yet Judge Keech told them, in effect, that they might consider this point in debating the question of "product" in the jury room. Actually, he went much farther. He gave no other illustration of the meaning or reach of the "product" test. This "right or wrong" test, he told the jury, is my only illustration to you on the question of "product". Therefore, if the jury listened attentively to the charge, they would have no other concept of "product" before them, in their deliberations, except the "right or wrong" test.

But how could they apply this test, in complete darkness? Judge Keech, in effect, told them that they were to determine a basic issue of the defendant's guilt or innocence by applying a standard which was literally impossible to apply. They could not properly determine "product" on the "right and wrong" standard because there was no "right and wrong" evidence from the only source permitted by Judge Fahy's opinion in Douglas, supra, namely "the expert witness."

We know how difficult some of the nuances of Durham and its descendants have been for judges and for the trained members of the bar. How much more difficult they must be for untrained jurymen and jury women, hearing of

these problems for the first time.

The importance of the question is emphasized by the fact that this very point was mooted and reserved by this Court in Campbell v. United States, App. D.C. , 307 F.(2d) 597 (1962). At 307 F.(2d) page 600, in footnote 5, the Court mentions that the trial judge included a "right and wrong" instruction in his charge, and quotes the Douglas phrase "where a proper evidential foundation is laid." The footnote closes:

> "Here, there is considerable doubt as to whether such evidential foundation existed. Since we are reversing because of other defects in the instruction, however, it is unnecessary for us to rule on this point."

In the present case, there is no doubt that no evidential foundation existed. The question reserved in Campbell is squarely before the Court.

We submit that it is unanswerably clear that the injection of "right and wrong" into Judge Keech's charge was an error of the first magnitude, prejudicial to the appellant and requiring reversal and a new trial.

C. McDONALD v. UNITED STATES; HAWKINS v. UNITED STATES.

The opinion in McDonald is dated October 8,

1962 and the opinion in Hawkins is dated November 1, 1962, long after the date of the appeal in the present case. The allowance of this appeal in forma pauperis is dated October 12, 1962. The points made in McDonald and Hawkins were therefore unavailable to trial counsel and to Judge Keech at the trial of the present case and were unavailable to the writer of this Brief at the time the memorandum was filed on September 12, 1962, in support of appeal in forma pauperis.

It is clear that the principles of McDonald and Hawkins were not complied with in this case.

At page 7 of the slip opinion in McDonald, this Court said:

> "What psychiatrists may consider a 'mental disease or defect' for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility. Consequently, for that purpose the jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." (Emphasis supplied.)

This was quoted and approved at page 4 of the slip opinion in Hawkins.

Further, at page 5 of the slip opinion in Hawkins,

the Court says:

> "Psychiatric testimony should be directed toward explaining what the expert has observed about the dynamics of the defendant's mental condition; for example, about his symptoms, characteristics, behavior and history; and toward indicating, if the psychiatrist is in a position to do so, the effect of the observed condition on the development, adaptation and functioning of the defendant's mental or emotional processes and his behavior controls. Proper examination of the expert as to these matters will provide the jury with a basis for determining the first ultimate issue: whether the evidence shows the existence of mental disease. Given this information, under proper instructions, the jury cannot only make its own decision as to the ultimate issue, but can also decide for itself whether the defendant's act was a product of the mental diseases, if one can be found to exist."

We respectfully request the Court, if it decides to reverse and remand this case for a new trial, to note in its reasons the failure of the testimony and the charge in this case to meet the McDonald and Hawkins standards.

II

THE COURT ERRED IN PERMITTING THE JURY TO FIND A VERDICT OF GUILTY ON THE INSUFFICIENT EVIDENCE OF DR. PLATKIN.

A. Introduction

This record includes another problem which appears

to be of first impression in this Court and which is a matter of the most profound importance in the administration of justice in criminal cases. This problem is not one of interest to defendants only; it is of equally vital interest and importance to the Government.

The problem may be stated in these alternative terms:

> (1) "Where the Government admittedly has the burden of proof under Davis, is that burden satisfied by the testimony of a psychiatrist whose opinion is based upon factual material, (1) not admitted by the defendant, (2) not material of the witness' own personal knowledge, (3) not introduced into the record by other witnesses who do have personal knowledge?"
>
> (2) "To what extent is the rule against hearsay testimony to be set aside when a psychiatrist gives an opinion on the sanity of a patient? To what extent may he give his opinion based upon the undisclosed and unproduced examinations and opinions of other doctors or psychologists? To what extent may he give, not only his own opinion, but the collective opinion of a large group of doctors and technicians who have talked together in a staff conference?"

B. The content of Dr. Platkin's testimony

The Trial Judge properly placed the heavy burden of "proof of sanity beyond a reasonable doubt" upon the Government. (J.A. 41, 42, 43) There was no testimony at all in the case which could serve to sustain that burden

except the testimony of Dr. Platkin. By permitting this issue to go to the jury on that testimony, by accepting the verdict of guilty, and by entering judgment and sentence thereon (J.A. 44-5), the Trial Judge declared the sufficiency of that testimony to meet that burden.

It is our contention that this testimony was, in every respect, insufficient to sustain that burden and that a new trial should be awarded.

What did Dr. Platkin say? His testimony may be fairly summarized as follows:

(1) He was in charge of the maximum security division at the Hospital, the division where indicated offenders are placed for mental examination (J.A. 18).

(2) He knew the defendant and the nature of the offenses of which he was charged (J.A. 19).

(3) The defendant was examined by the "staff" at the Hospital (J.A. 19).

(4) Dr. Platkin did not himself spend much time with the defendant (J.A. 19); he could recall only one contact, the staff conference on November 27, 1961 (J.A. 20-1).

(5) There was a staff conference with respect to the defendant on November 27, 1961. The conference included Dr. Platkin, a Dr. Owens, a Dr. Dobbs, a Dr. Hannon, three resident physicians and three psychologists (J.A. 19-20).

(6) The defendant underwent a number of examinations (J.A. 21).

(7) Among these was a neurological examination on September 22, 1961 by a Dr. Green (otherwise unidentified) (J.A. 27) who "found nothing" (J.A. 21) and "nothing abnormal" (J.A. 25); skull x-rays by an unidentified x-ray man, which were "within normal limits" (J.A. 21); an electroencephelogram by an unidentified technician which showed "entirely normal" (J.A. 21); spinal fluid examinations by an unidentified examiner, which were "essentially negative" (J.A. 22); and, most significantly, a "battery" of different psychological examinations, by unidentified psychologists, which "<u>are interpreted by the clinical psychologists, which I am not</u>" (J.A. 22).

(8) The psychological tests showed:

(a) Defendant's intelligence was "borderline" (J.A. 22).

(b) Some evidence of emotional inability (J.A. 22).

(c) Some "very, very questionable evidence that there might be some organic brain changes." (J.A. 22)

(9) In requesting the neurological examination, Dr. Green, the neurologist, was <u>not</u> given "a full picture" of the defendant (J.A. 25) and the conclusions from his unidentified and unproduced report were made by Dr. Platkin (J.A. 25).

(10) Dr. Platkin had no knowledge of Dr. Green's qualifications (J.A. 27).

(11) "...from all the examinations by the doctors in the different fields, (Dr. Platkin) concluded after the staff conference that (defendant) was suffering from no disease or mental defect." (J.A.28)

We should emphasize at this point the following vital comments on Dr. Platkin's testimony and the Government's proof.

(1) Neither Dr. Owens, Dr. Dobbs nor Dr. Hannon, who participated in the "staff conference" appeared as a witness at the trial.

(2) None of the "three resident physicians" who participated in the staff conference appeared as a witness at the trial.

(3) None of the "three psychologists" who participated in the staff conference appeared as a witness at the trial.

(4) Dr. Green, the neurologist, did not appear as a witness at the trial, nor was any written report from him offered in evidence.

(5) The anonymous x-ray man did not appear as a witness at the trial, nor was any written report from him offered in evidence.

(6) The anonymous spinal fluid examiner did not appear as a witness at the trial, nor was any written report from him offered in evidence.

(7) The anonymous electroencephelogram technician did not appear as a witness at the trial, nor was any written report from him offered in evidence.

(8) The anonymous psychologists who conducted the "battery" of tests did not appear as witnesses at the trial, nor were any written reports from them offered in evidence.

(10) Dr. Platkin made it very clear that his opinion was not based on his own personal knowledge, observations, and conclusions but largely, if not entirely, on the second-hand knowledge, observations and conclusions of third persons, mostly anonymous, and whose testimony is no part of the record. As he put it (J.A. 20) he was giving, not his own opinion, but "our opinion", i.e. "the opinion of the staff."

C. The limit of appellant's position.

Before we examine the authorities in this Court, it is important to state our position, and particularly

what our position is not.

We need not, in this case, enter into any general discussion of how medical evidence is to be produced in a lawsuit. We recognize that both the general rule in the United States and the opinions of this Court permit certain limited invasions of the hearsay rule in medical testimony. This case is not the place to discuss this academically, since this case deals only with the widest and most extreme violation of the hearsay rule.

To illustrate - this case does not involve the situation where Dr. A. testifies on the witness stand, and Dr. B., who was in the courtroom and heard Dr. A. testify, later takes the stand and gives an opinion based in part of what Dr. A. has said.

Further, this case does not involve the situation where a full, formal written report of Dr. A. is offered in evidence by the Government and Dr. B., having studied this report and knowing its content, later takes the stand and gives an opinion based in part on what Dr. A. said in his report.

To the contrary, this case does involve, and involves only, the very different situation of Dr. B. taking the stand as the only medical witness, with nothing pre-

viously offered, and then testifying himself on what Dr. A. had told him and what was in the written report of Dr. A., which is never introduced into evidence.

Whatever interesting questions are contained in the first two illustrations above will be ripe for argument before this Court in some other case, not this one. This is inevitable, because, in this case, no Dr. A. ever testified and no written report of a Dr. A. was ever offered into evidence.

This Brief, and this argument, are confined solely to the third illustration, the case where only a Dr. B. is on the stand, and no other medical evidence, oral or written.

D. The authorities.

We may start with the statement of this Court in Carter, supra, as to the basis for the expert medical testimony in these cases.

> "The chief value of an expert's testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusions; in the explanation of the disease and its dynamics, that is, how it occurred, developed, and affected the mental and emotional processes of the defendant; it does not

lie in his mere expression of conclusion. The ultimate inferences vel non of relationship, of cause and effect are for the trier of facts." (Emphasis supplied.)

And further -

"The law wants from the medical experts diagnostic testimony as to a mental illness, if any, and expert medical opinion as to the relationship, if any, between the disease and the act of which the prisoner is accused." (Emphasis supplied.)

This is only an elaboration of the same principle as stated in Winn v. United States, 106 App.D.C. 133, 270 F. (2d) 326 (1959).

"Opinion evidence, to be of any value, should be based either upon admitted facts or upon facts, within the knowledge of the witness, disclosed in the record. Opinion evidence that does not appear to be based upon disclosed facts is of little or no value." (Emphasis supplied.)

The decisions of this Court also make it clear that if the record indicates that the Government has not introduced sufficient competent evidence to sustain its burden of proof, beyond a reasonable doubt, a verdict of "guilty" will not be allowed to stand.

In Satterwhite v. United States, 105 App.D.C. 398, 267 F.(2d) 675 (1959), the Court says:

"But the record is barren of competent evidence on the part of the Government to demostrate the appellant's

capacity as of (the date of the offense)".

In Douglas, supra, the Court said:

> "On any rational view of this evidence, emanating from Government sources, reasonable doubt existed as to Douglas' sanity."

In Hopkins v. United States, 107 App.D.C. 126, 275 F.(2d) 155 (1959), the Court said in footnote 2 to 275 F. (2d) page 157:

> "We must reverse a criminal conviction when it is clear to us that upon the evidence. . .a reasonable mind must necessarily have had a reasonable doubt as to . . .guilt."

And further, in Hopkins, the problem is neatly stated by Judge Bastian at 275 F. (2d) page 159:

> "The District Court Judge was thus faced with the question of whether, since some evidence of insanity had been introduced by the defense, the evidence on the part of the Government was sufficient to prove appellant sane beyond a reasonable doubt." (Emphasis supplied.)

An analysis of the hearsay rule begins with Lyles v. United States, 103 App.D.C. 22, 254 F.(2d) 725 (1957). In this case, this Court rejected as improper hearsay a written expert report on mental condition. The Court held that this was not within the statutory exception to the hearsay rule as expressed in the Federal Shop

Book Act, 28 U.S.C. §1732. The opinion says:

> "To submit to a jury a written notation of a medical opinion upon a complex and difficult matter, without presentation of any witness and without cross-examination of the author of the opinion, would be to submit as a fact the medical conclusion of a doctor without inquiry, showing on cross-examination as to his qualification, the data upon which he rested his opinion, or the reasoning by which he reached his conclusion. That is the vice of submitting to a jury, without a witness, hospital notations of mere opinion. Gross injustice and error could easily ensue from such a course."

Judge Bazelon wrote a dissenting opinion in Lyles, disagreeing with the total exclusion of the written report, but he carefully refrained from a total abolition of the hearsay rule. He would admit the hearsay report, but limited to the personal observations of the writer of the report and to the recording of the statements of the patient. (254 F.(2d) at page 741)

We have found six other post-Durham opinions of this Court which seem to have some bearing on the hearsay question raised here. They are

Turberville et al. v. United States, App. D.C. , 303 F.(2d) 411 (1962)

Jones v. United States, 109 App.D.C. 111, 284 F.(2d) 245 (1960)

Carey v. United States, App.D.C. ,
296 F.(2d) 422 (1961)

Blunt v. United States, 100 App.D.C. 266,
244 F.(2d) 355 (1957)

Briscoe v. United States, 101 App.D.C. 318,
248 F.(2d) 640 (1957)

Jenkins v. United States, App.D.C. ,
307 F. (2d) 637 (1962)

A careful analysis of the record, briefs and opinion in each of the five cases other than Jenkins (which is considered separately, infra) shows that none of them directly deals with the problem here.

(1) In Turberville, et al., supra, a psychologist was produced and testified in detail. (J.A.145-7) The Army's Intelligence test records were introduced (J.A. 150-1) and an Army psychologist gave a professional opinion on the stand (J.A. 152-4). Dr. Owens of St. Elizabeth's gave his own, and only his own, opinion. (J.A. 157)

The only point respecting the Government's testimony raised by counsel for the appellant in that case, was that Dr. Owens had not produced the full St. Elizabeth's report. His argument on this point occupies 11 lines on page 7 of the appellant's Brief in that case.

No question of hearsay was presented.

(2) In Jones, the case was tried before Judge Letts without a jury. Dr. Platkin, the same man who testified in the present case, testified for the defendant as to his insanity, giving his own opinion (J.A. 20) and a Dr. Ryan testified for the Government, giving his own opinion.

As defense counsel said, in his closing argument to the judge,

> "We stipulated to the facts and it is just a difference of opinion between the two doctors."

No question of hearsay was presented.

(3) In Carey, there is an enormous record. It indicates that a psychologist was produced, and testified at great length (J.A. 45-113), including the details of all tests given (J.A. 47-50), the exact conclusions reached and the professional opinion (J.A. 51-8). In the exhaustive cross-examination (J.A. 58-98), the psychologist's notes and records were produced, including the details of the answers of the defendant to each of the 10 standard Rohrschach test cards. (J.A. 62-92)

Following this a psychiatrist gave a full detailed history of the defendant, based on his own examination (J.A. 116-120), and three members of the St. Elizabeth's staff, Drs. Platkin, Owens and Cushard testified. Each

testified as to his own opinion, (J.A. 259, 365, 471) and all the St. Elizabeth's original files were produced, (J.A. 336-7, 343) as well as the doctor's typewritten notes (J.A. 338).

In the appellant's brief (pages 14c, 14d) only two questions were raised

(1) the St. Elizabeth's doctors had not made an adequate examination within the Winn rule, supra;

(2) the doctors had intimated, without specifically so stating, that the opinions of the unproduced other people at the "staff conference" were unanimous with their own.

In the appellant's brief the first question above was exhaustively argued (Brief pp. 15-21). The second point, respecting the "staff conference" was brushed over lightly in 24 lines on pp. 28-9 of the brief, for obvious reasons. The Trial Judge had admitted the results of the "diagnostic conference" for the sole reason that the defendant himself had "opened the door wide" (J.A. 332). The defendant, having actively introduced this evidence, could not later attack its competency.

The key to this Court's opinion in Carey, with

respect to the propriety of testimony concerning the "staff conference" is in the phrase

> "an examination given under accepted psychiatric technique and based upon demonstrable evidentiary data." (Emphasis supplied.)

which appears in 296 F. (2d) at p. 425. That statement, in effect, restates the conventional rule for expert testimony.

(4) In Blunt, the Government introduced no evidence at all to satisfy its burden under the Davis rule and

> "apparently relied upon the circumstances of the alleged crimes as implying Blunt's capacity to plan and upon the testimony of one of the victims that Blunt had not acted unusually." (244 F. (2d) at p. 362)

This Court permitted the expert opinion of a psychiatrist based upon

> "facts he has himself observed, or facts he has heard others relate" (Emphasis supplied). (244 F. (2d) at p. 364)

At first blush this is an apparent total relinquishment of the hearsay rule. But Judge Bazelon carefully put a footnote reference after the word "relate" and added this note:

> "The psychiatric witnesses were permitted to be present during the testimony of the other witnesses."

This follows the conventional hearsay rule. The expert may testify based upon the evidence of third persons properly and previously introduced into the record at the trial.

(5) Finally, in Briscoe, this Court had before it only a motion for leave to proceed in forma pauperis. As Judge Bastian pointed out in his opinion, the entire record was not before the Court and there was no basis for the discussion of any aspect of the merits of the insanity defense.

Interestingly enough, when the case was later heard on the merits, this Court reversed per curiam on the sole ground of the error of the District Judge in declining to permit the defendant to withdraw a plea of guilty. (102 App.D.C. 145, 251 F.(2d) 386 (1958).

E. Jenkins v. United States

We submit that Jenkins, supra, contains an answer to the problem raised in this case.

Jenkins primarily dealt with the "substantive" question of the competency of a psychologist to give a medical opinion as to mental disease or defect. Seven judges agreed that a psychologist could qualify for this purpose, dependent upon his training and experience. The two dissenting

judges would confine the psychologist to testifying about his psychological testing of the defendant and would not permit to offer a "medical" opinion on disease or defect.

Nevertheless, Jenkins contains language on the question of expert testimony of the utmost importance.

The key to Jenkins lies in the following: A Dr. Schaengold, an unquestioned psychiatric expert, who was the Assistant Chief Psychiatrist at District General Hospital, interviewed the defendant "three or four times". Dr. McIndoo, the Chief Psychiatrist, conducted three interviews. (307 F.(2d) at page 639) They made a diagnosis of mental defect. Later the defendant was independently examined at St. Elizabeth's. Here the psychologists found mental defect, but the psychiatrists concluded otherwise. (307 F. (2d) at page 640) The defendant wished to use Drs. Schaengold and McIndoo as defense witnesses at the trial, on the issue of insanity. Accordingly, these two doctors requested their own Chief Psychologist to retest the defendant, in the light of the contrary conclusions reached at St. Elizabeth's. (Ibid.) Upon receipt of the results of the new tests, both Dr. Schaengold and Dr. McIndoo revised their previous diagnoses "without seeing appellant again". (Ibid.)

Drs. Schaengold and McIndoo were called as defense witnesses, but the Trial Judge refused to accept their revised opinions. (Ibid.)

On appeal, the Government first argued for a strict hearsay rule, namely, that the two doctors could not use the later tests unless there was another contemporaneous personal examination. This Court rejected that position (307 F.(2d) at page 641) This Court held squarely that Dr. Schaengold could make a revised diagnosis "on the basis of an earlier examination and later test reports", (Ibid.) even though these test reports were "not in evidence" when he testified. (Ibid.)

This Court then stated (citing the Wisconsin Supreme Court) a modified hearsay rule, that it was proper to -

> "admit opinion testimony based, in part, upon reports of others which are not in evidence but which the expert customarily relies upon in the practice of his profession". (Ibid.)

The Court also stated (307 F.(2d) at page 642) -

> "The record in this case confirms the well-known practice of psychiatrists of relying upon psychologists' reports in aid of diagnosis".

A careful reading of the concurring and dissent-

ing opinions in Jenkins indicates that all nine judges, who heard Jenkins in banc, agreed with this portion of the majority opinion.

We take it, therefore, that it is now settled in this Circuit that an exception does exist to the hearsay rule in these insanity cases; and that a psychiatrist may give his diagnosis of mental health or illness based, to some extent, upon background material which is not in evidence when he testifies.

However, this is not the end of the problem, so far as the present appeal is concerned.

The opinion in Jenkins contains two significant qualifications:

> (1) if the psychiatrists' opinion is based solely on undisclosed outside reports, the hearsay rule is violated and the opinion evidence is inadmissible. (307 F. (2d) at page 642, and fn. 9)
>
> (2) if the psychiatrists' opinion is based partly on these undisclosed outside reports, and partly upon his own examinations, the opinion is admissible, but the Court must appropriately instruct the jury on the weight

to be given to the opinion under the circumstances. (307 F.(2d) at page 641)

Perhaps other counsel in other cases may seek to reargue the principles established in Jenkins. We will not do so here, since we can accept those principles, certain that they will require a reversal here.

The correctness of principle numbered (2) above, which is the principle to be applied in the present appeal, is obvious.

To illustrate, if the psychiatrist spent only ten minutes in personal examination of the defendant, but the outside technicians studied him for fifty hours, and rendered thirty different reports, all of which the psychiatrist used in his diagnosis, his opinion would be so close to a "total" reliance on the outside material as to make it nearly worthless. But it would not be inadmissible, under the Jenkins rule, because the diagnosis did not rest solely on the outside material.

At the other end of the spectrum, if the psychiatrist met with the defendant ten times, for a total of twenty hours, and personally attended all the subsidiary examinations except for one set of psychological tests, his

opinion would be almost "totally" his own observation.

And, in between these extremes, there are hundreds of variations in weight.

As this Court stated, in Jenkins (307 F.(2d) at page 641):

> "We think it clear that Dr. Schaengold's ability to make the revised diagnosis without conducting a personal reexamination presents a question for the consideration of the jury, under appropriate instructions, in assessing the weight of his testimony and not a question for the court upon which it may rest exclusion of the diagnosis as a matter of law". (Emphasis supplied.)

The record in this present appeal shows a clear violation of the Jenkins rule. The facts indicate that Dr. Platkin's testimony was based almost totally on the undisclosed and unoffered opinions of outsiders.

The opinions and reports of the outsiders consisted of a neurological examination (J.A. 21), an x-ray examination (J.A. 21), an electrocephelogram (J.A. 21), a spinal fluid examination (J.A. 22 and a "battery" of psychological examinations, interpreted by outsiders (J.A. 25). Further, the neurologist was not given "a full picture" of the defendant. (J.A. 25)

It is true that Dr. Platkin did personally see

the defendant for a single session at the "staff conference" (J.A. 21), so that his opinion was technically "admissible" under the Jenkins rule, since it was not "totally" based on the undisclosed outsiders' reports and opinions.

But Dr. Platkin himself denigrated the value of his own opinion down to almost zero. First he testified that other psychiatrists at St. Elizabeth's examined the defendant, but these other men were not produced in court. (J.A. 20) Second, he gave, not his own opinion, but "the opinion of the staff", i.e. "our opinion". (J.A. 20) Finally, at the end of his testimony, the Trial Judge asked him:

> "Doctor, in sum am I understanding you to say, that in your opinion, that from all the examinations by the doctors in the different fields, you concluded after the staff conference that this man was suffering from no disease or mental defect?" (J.A. 28) (Emphasis supplied.)

to which he replied: "That is my position, Your Honor."

In this factual situation, the need for a careful instruction to the jury on the weight to be assigned to Dr. Platkin's testimony is obvious. Here not a single supporting witness was called. Not a single supporting document was offered. Nothing was offered but Dr. Platkin's minimal testimony and the hearsay repetition of the uncorroborated opinions of outsiders.

This record is as dangerously close to "total" reliance on outside opinion as it is possible to get.

Yet there is nothing in the charge of the Trial Judge which remotely complies with the rule of Jenkins.

All that he said were the following stereotypes:

> "You should consider the testimony of the expert and weigh the reasons, if any, given for his opinion.
>
> You are not, however, bound by such opinion. You may give his opinion such a weight as you deem it entitled to receive, and you may reject expert testimony if, in your judgment, the reasons for that opinion are unsound." (J.A. 43)

Are these "appropriate instructions" within the meaning of Jenkins? Does this inform the jury that the weight of Dr. Platkin's testimony is to be judged, in part, by the relative value of his own personal examination as against the results of the examinations and opinions of outsiders, who were not produced to the jury?

If these stereotyped generalities are "appropriate instructions" in this difficult field, then they will suffice in every case and the standard becomes utterly meaningless.

III. CONCLUSION

The verdict and judgment should be reversed in this case and a new trial ordered for two independent reasons.

First, the erroneous inclusion of the "right and wrong" test in the charge, in violation of the rules laid down in Douglas and McDonald, was a basic, fundamental error, of substantial prejudice to the defendant-appellant.

Second, the handling of the expert testimony of Dr. Platkin, in violation of the rules laid down in Jenkins, was a basic, fundamental error, of substantial prejudice to the defendant-appellant.

Respectfully submitted,

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Attorney for appellant by
appointment of this Court.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17442

HORACE SIMPSON, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.
FRANK Q. NEBEKER,
TIM MURPHY,
BARRY SIDMAN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

Appellant cut his wife's throat with a razor in the presence of witnesses. His defense was temporary insanity. He testified that he remembered going up to his wife, and leaving her, but not attacking her. He claimed he blacked out, and said he had done so before. A St. Elizabeths Hospital psychiatrist testified that appellant was of sound mind at the time of his crime, and that examinations of appellant revealed no corroborative evidence of blackout spells. Appellant did not object to the testimony of the witness, or any part of the trial court's instructions. In the opinion of appellee the following questions are presented:

1. Did appellant introduce some evidence of insanity?

2. If appellant's sanity was put in issue, did the trial court commit plain error when instructing the jury as to expert testimony?

3. If appellant's sanity was put in issue, did the trial court commit plain error when explaining "productivity" to the jury?

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TABLE OF CASES

OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

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HORACE SIMPSON, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On July 20, 1961, appellant was indicted in two counts for assault with a dangerous weapon and assault with intent to kill. Counsel (T. S. L. Perlman, Esq.) was appointed and appellant pleaded not guilty. On August 1, 1961 Mr. Perlman's appointment was vacated and new counsel (W. E. Owen, Esq.) was appointed. On August 8, Mr. Owen's appointment was vacated and new counsel (F. Cook, Esq.) was appointed. On August 25, appellant moved to vacate Mr. Cook's appointment. On September 1, pursuant to his motion for a mental examination, appellant was committed to St. Elizabeths for ninety days. The Hospital found him competent to stand trial, and of sound mind at the time of his alleged crimes. On December 8 the motion to vacate the appointment of Mr. Cook was denied. On January 9, 1962 appellant entered a plea of guilty to Count 1 (assault with a dangerous weapon). On January 26, however, he successfully moved to withdraw his plea and to vacate his counsel's appointment. On January 29 new counsel (Alan

Kay, Esq.) was appointed. Tried by jury on March 21, appellant was found guilty and sentenced on May 3 to three to nine years imprisonment. This Court granted appellant leave to appeal in forma pauperis on October 12, 1962.

THE CRIME

Appellant Simpson cut his wife's throat on April 12, 1961. Mary Simpson, the victim, was talking to one John Taylor at the corner of 4th and L Streets, Northeast (J.A. 5). Her husband, (appellant), came on the scene. She ran from him. He caught her, pushed her up against a fence, and cut her throat with a razor. (J.A. 5, 10, 11.) He then fled (J.A. 14). Mrs. Simpson was hospitalized (J.A. 6). There were three eye witnesses to the assault (J.A. 11, 14, 16).

Appellant telephoned his wife about five weeks later from New Jersey, and told her he regretted what he had done (J.A. 7).

EVIDENCE OF INSANITY

Appellant's sole ostensible defense was insanity. He called his brother as a witness, but Eddie Simpson testified that he had never seen appellant have a fainting or blackout spell (the nature of appellant's alleged insanity) (J.A. 17–18). Appellant was thus the sole defense witness. He testified that he had suffered from some blackout spells since 1954 or 1955 (J.A. 32). The number and frequency were not specified. On direct examination he stated that his wife had left him three weeks before the assault; that on April 12, 1962, while driving around his neighborhood he saw his wife; that he went to her for the purpose of giving her money to care for their children; that the next thing he remembered was driving around a corner in the vicinity to pick up a co-worker (J.A. 29–31).

On cross examination, appellant stated that after he went to his wife to give her money, she "went away" or "walked away" from him, and that he then just turned and walked away (J.A. 37, 39). After he left his wife, he said, he went around the corner to a lunchroom (J.A. 38). His recollection of going to the lunchroom was unclear (J.A. 39). He then returned to where he had met his wife and was informed that the police were looking for him (J.A. 38). At this point his memory again

faded; the next thing he remembered was being in Maryland that afternoon (J.A. 33). He admitted that he retained his children's clothes for three weeks while the children were in his wife's custody (J.A. 36). He suggested he had been framed (J.A. 39–40).

The case proceeded on the assumption that appellant had introduced some evidence of insanity. The Government called as a witness Dr. Mauris Platkin, senior medical officer in charge of John Howard Pavilion, St. Elizabeths Hospital. Dr. Platkin had examined or seen appellant several times during appellant's three month commitment to St. Elizabeths; however, he specifically recalled only one contact (J.A. 19, 21). Appellant had received, during his commitment, a neurological examination by a nerve specialist, skull X-rays, an electroencephalogram, spinal examinations, psychological examinations, and personal interviews (J.A. 21, 22). Dr. Platkin was familiar with the results of the several examinations (J.A. 21–28).

Dr. Platkin believed that appellant was without mental disorder, defect, disease, illness or sickness at the time of his crime (J.A. 20). He based his conclusion on his personal observations and on the results of the various tests administered to appellant (J.A. 20, 28). He stated that no corroborative evidence of appellant's alleged blackout spells had been found (J.A. 20). The neurological examination showed no evidence of epilepsy or brain tumor, or any other type of brain injury (J.A. 21). Neither did the results of the X-rays, the spinal check, or the psychologicals (J.A. 21, 22). Dr. Platkin stated his opinion that appellant suffered no epileptic attack, or any equivalent thereof, on April 12, 1961 (J.A. 21, 28).

Dr. Platkin further stated that the consensus of opinion rendered at a staff conference attended by himself, Dr. Owens, Clinical Director of John Howard Pavilion, Dr. Dobbs and Dr. Hannon, both staff psychiatrists, three resident physicians and three psychologists was that appellant was without mental disorder (J.A. 20, 21). Appellant objected to no part of Dr. Platkin's testimony.

The court, *inter alia*, instructed the jury on the issue of insanity (J.A. 40–44). Appellant found the instructions entirely satisfactory (Tr. 59).

RULE INVOLVED

Rule 30, Federal Rules of Criminal Procedure, provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

SUMMARY OF ARGUMENT

Appellant did not offer "some evidence" of insanity. His uncorroborated claim of having blacked out in the past, coupled with his alleged loss of memory (the extent of the loss varying from one statement at trial to another) when he assaulted his wife, fails to meet the standard of *McDonald* v. *United States*, *infra*, and related cases.

Even if the insanity issue were in the case, no error appears. The Government's expert witness stated his conclusion that appellant was of sound mind on the basis, in part, of the examination and tests of other doctors. His testimony was the subject of correct and unobjected to instructions to the jury.

The trial court's instructions on the issue of insanity were correct. The court did not err when, in attempting to illustrate "productivity" to the jury, it gave one example in terms of "right-wrong." The instructions were not objected to; if the court's statement was erroneous, the error was harmless.

ARGUMENT

I. Appellant did not introduce some evidence of insanity

Appellant's trial proceeded on the assumption that appellant's sanity had been put in issue. This Court should give due weight to the *sub silentio* finding of the trial court that, as a matter of law, the insanity defense had been adequately raised. But the Court should not be bound by that finding, for if the trial court were in error, appellant would, in effect, obtain remedy from this Court where he had not in fact been wronged. If there was insufficient evidence in the case for reasonable men to doubt appellant's sanity, then appellant should not be heard to complain about that issue. The evidence was clearly insufficient.

Appellant said he could not remember cutting his wife's throat. He said he had blacked out before. This was his insanity defense. Had appellant not said that he blacked out before, *Wilson* v. *United States*, 109 U.S. App. D.C. 337, 288 F. 2d 121 (1960) (rejecting application for leave to appeal in forma pauperis as frivolous) would be completely dispositive. In *Wilson*, petitioner testified as to his great rage before shooting his girl-friend (he told police he "saw red"), his good relations with the deceased prior to the shooting, and his loss of memory as to the shooting. He disavowed any intention to kill the deceased, and said that he must have acted while temporarily insane. This Court said that such evidence might amount to a plea of insanity, but nothing more, and clearly did not warrant an instruction on insanity. See also *Lebron* v. *United States*, 97 U.S. App. D.C. 133, 229 F. 2d 16 (1955), *cert. denied*, 351 U.S. 974. (defendant's hysterical behavior before and during attempt to shoot Congressmen, and belief that she was emulating George Washington, insufficient to constitute "some evidence" of insanity); *Wright* v. *United States*, 94 U.S. App. D.C. 307, F. 2d 498 (1954) (appellant's testimony that just before the shooting he was struck on the head with a bottle and remembered nothing until several hours later, in part corroborated by testimony of arresting officer, insufficient to constitute "some evidence" of insanity).

Appellant's claim of memory loss, or blackout, is at best a plea of temporary insanity.[1] His uncorroborated claim of past blackouts does not constitute "some evidence" in support of that plea. Evidence of a history of the type of insanity alleged to exist is of course relevant, and may in a given case be sufficient to put sanity on issue. But a mere assertion that there is a history, without more, is insufficient. Otherwise, defendants would be supplied a magic formula for raising the issue, in the form of two self-serving, uncorroborated statements: "I don't remember" and "I've not remembered before." The Government would be unable effectively to cross-examine as to the claim of a history; impossible to dispute, the claim would stand.

"Some evidence" of a history could take many forms. Witnesses could be summoned, both expert and lay. Indeed, had appellant produced only *one* witness to *one* instance of "blackout," his sanity might well have been put in issue. Significantly, appellant's brother, who might have so testified (if such were the fact) stated that he had never observed a single blackout spell.

In any event, appellant's testimony was not credible. Appellant first stated that he did not remember what happened after he saw his wife and went up to her (J.A. 31). But on cross-examination his memory improved, and he recalled that his wife walked away from him unharmed, and that he turned and walked away from her (J.A. 37). He also remembered that he walked to the lunchroom, and then returned, to learn that the police were looking for him (J.A. 38). Appellant must have realized, during his cross-examination, that in his eagerness to disassociate himself from his crime (*e.g.*, he specifically denied cutting his wife's throat—J.A. 37) he had disassociated himself from his alleged blackout. In other words, he had remembered too much. He left no time for him to have assaulted his wife during a blackout. Accordingly, he repudiated part of his testimony, and expressed some doubt as

---

[1] That mental state known as "temporary insanity" has been commented upon skeptically. "The temporary insanity dear to the hearts of defense lawyers, however, is wholly a thing of the moment. . . . [T]his peculiar malady seems to occur only in homicide cases." Guttmacher and Weihofen, Psychiatry And The Law 396 (1952).

to whether he remembered going to the lunchroom after seeing his wife (J.A. 39). Obviously not impressed with his claimed blackout, appellant finally suggested he was being framed (J.A. 40).

The "some evidence" of insanity must be credible evidence. See *Tatum* v. *United States*, 88 U.S. App. D.C. 386, 190 F. 2d 612 (1951). Appellant's testimony was not to be believed. This Court has stated that there "can be no sharp quantitative or qualitative definition of 'some evidence'". *McDonald* v. *United States*,——U.S. App. D.C. ——, —— F. 2d —— (1962). However flexible be the definition, it does not comprehend the evidence in the case at bar.

II. The instructions of the trial court on the testimony of the government's expert witness were proper

Dr. Platkin, a St. Elizabeths Hospital psychiatrist, testified that in his opinion, appellant was of sound mind. This opinion was based on his personal examinations of appellant (J.A. 19) and the results of the examinations of appellant conducted by other doctors (J.A. 28). The jury was instructed concerning his testimony. The trial court stated (J.A. 43):

> On the issue of insanity there was called in this case a psychiatrist, a person who, by profession, is known as an expert in his particular field, in other words, a doctor specializing in psychiatry.
>
> A person who, by education, study, or experience, has become an expert in any art or science or profession, and who is called as a witneses, may give his opinion as to any matter in which he is versed, and which is material to the case.
>
> Such witnesses are referred to as expert witnesses.
>
> You should consider the testimony of the expert and weigh the reasons, if any, given for his opinion.
>
> You are not, however, bound by such opinion. You may give to his opinion such a weight as you deem it entitled to receive, and you may reject, expert testimony if, in your judgment, the reasons for that opinion are unsound.

These instructions were adequate. If something more was appropriate, appellant failed to note it. Rule 30, Fed. R. Crim. P. precludes such belated observations.[2]

III. The trial court did not commit plain error in instructing the jury on the issue of insanity

When instructing the jury on the question of productivity, the trial court stated:

> As to the second element, that the criminal act was the product of the mental abnormality, this simply means that the act resulted from or was produced by or was caused by mental disease or mental defect suffered by the defendant.
>
> To put it another way, that the defendant would not have committed the offense or offenses but for his mental disease or defect.
>
> As an example of this causal connection or relation, if a person at the time of the commission of a crime is so deranged mentally that he cannot distinguish between right and wrong, or, being able to tell right from wrong, he is unable by virtue of his mental derangement to control his actions, then his act is the product of his mental derangement. (J.A. 42.)

These instructions were proper. Appellant's contention that the court's mere mention of "right and wrong" constitutes plain error is without merit. There was no evidence presented of a "right-wrong" character, but the court did not say that there was. The court simply gave an example of the "but for" relationship between mental disease and criminal act. It did not suggest that this was the sole possible illustration. It did not suggest that the illustration was addressed to the specific facts of the case. The court did not suggest that the illustration repudiated the instructions and explanatory phrases (even now, acceptable to appellant) immediately preceding it. Appellant's argument that the court "erred in including the 'right and wrong' test" is thus without factual support.

---

[2] Appellant also suggests that he was entitled to a directed verdict. There is nothing to this point. See *Campbell* v. *United States*, —— U.S. App. D.C. ——, 307 F. 2d 597 (1962).

Even if the record supported appellant, no error requiring reversal appears. Appellant found the court's instructions satisfactory. The court did not fail to instruct on the essential elements of appellant's offense. See *Barry* v. *United States*, 109 U.S. App. D.C. 301, 287 F. 2d 340 (1960). *Cf., McKnight* v. *United States*, No. 17,032, D.C. Cir., *decided* October 25, 1962. Not made below, appellant's attacks may not be made now. Rule 30, Fed. R. Crim. P. See *Estep* v. *United States*, 223 F. 2d 19 (5th Cir. 1955), *cert. denied*, 350 U.S. 863.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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FRANK Q. NEBEKER,
TIM MURPHY,
BARRY SIDMAN,
Assistant United States Attorneys.

U.S. GOVERNMENT PRINTING OFFICE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 17,442

HORACE SIMPSON,

Appellant

v.

UNITED STATES,

Appellee.

APPEAL FROM A JUDGMENT IN THE DISTRICT
COURT OF THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT

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Attorney for Appellant by
appointment of this Court

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HORACE SIMPSON	:	
	:	
Appellant,	:	
	:	
v.	:	NO. 17,442
	:	
UNITED STATES	:	
	:	
Appellee.	:	

REPLY BRIEF OF APPELLANT

I. INTRODUCTION

This reply brief is confined to a single point, not raised in the court below, not touched upon in our main brief, and introduced into the case for the first time by the Government's brief. This reply brief does not reargue any of the matters covered by our main brief.

Our main brief dealt with two points,namely (1) the trial judge erred in his charge by the inclusion of a "right or wrong" standard; (2) the hearsay testimony of the Government's psychiatrist was insufficient to sustain the burden of proof, and the trial judge did not appropriately charge the jury on its weight. On both points, the trial judge acted in contradiction of the opinions of this Court. The Government's brief makes no real effort to

answer either of these points, except by the bald statement that they are not valid, and by invoking Rule 30. However, if these errors are not "plain errors or defects affecting substantive rights", within the meaning of Rule 52, that Rule has no meaning.

The Government actually pitches its entire argument on an entirely new point, namely, that there never was any insanity issue in this case at any time, because the defendant did not introduce "some evidence" of insanity within the Davis rule.

This reply brief will deal with this question only, since it was not touched upon in our main brief.

II. WHAT HAPPENED IN THE TRIAL COURT?

The question of the defendant's sanity was raised in this case from the very beginning. Six months before the trial began, Judge McGarraghy ordered the defendant committed to St. Elizabeth's for psychiatric examination. (J.A. 2) Dr. Overholser's report was filed more than three months prior to the opening of the trial. (J.A. 4)

The Government proved a prima facie case (J.A. 4 to 18). The defendant took the stand in his own defense. (J.A. 29-40) No defense was offered except insanity. The

defendant testified to black-out spells; to no recollection of the events of the offense; to no recollection of events between 6:00 in the morning of April 12th, and late in the afternoon; to no recollection of conversations with the police at the time of his arrest (the Government offered no police officer to testify that anything was said); and gave a garbled and unintelligible version of what happened at the time of the offense.

The Government, at the close of the defense testimony, made no suggestion that the Davis rule had not been satisfied. To the contrary, the Government immediately called Dr. Platkin of St. Elizabeth's as a rebuttal witness. (J.A. 18) His testimony is exhaustively analyzed in our main brief.

The trial judge, in clear and affirmative language, found: -

> (1) "...the defendant primarily contends that the defendant was not sane at the time of the crime..." (J.A. 40)
>
> (2) "...the issue of the defendant's mental capacity has been raised in this case..." (J.A. 41)
>
> (3) "...the burden is upon the Government to prove beyond a reasonable doubt..." the sanity of the defendant. (J.A. 42, 43)

(4) Dr. Platkin was called as a Government witness ". . .on the issue of insanity . . ." (J.A. 43)

We therefore have a record in which there is no defense except insanity; there is a direct finding by the trial judge that the defendant did introduce "some evidence" of insanity; there is a voluntary rebuttal by the Government on the issue of insanity; the court, in its charge, placed the burden of proof of sanity upon the Government; the Government accepted and concurred in all the foregoing.

III. THE GOVERNMENT'S ARGUMENT ON THE DAVIS POINT

The Government candidly admits that:

> "The case proceeded on the assumption that appellant had introduced some evidence of insanity." (Govt. Brief p.3)

The Government also admits that the trial judge found that appellant had done so. At page 5 of the Government's brief, the writers say: -

> "This Court should give due weight to the sub silentio finding of the trial court that, as a matter of law, the insanity defense had been adequately raised."

The Government further concedes that

> "The Court, inter alia, instructed the jury on the issue of insanity." (Govt Brief, p. 3)

The thrust of the Government's argument is that this Court should now reverse the finding of the trial judge that the defense had been adequately raised, a finding in which the Government concurred at the trial. If this Court will do that, the Government contends, then the clear error in the trial judge's charge on the issue of insanity will become "harmless error". (Govt.Brief, p. 5)

So far as our research discloses, this has never been done by this Court.

The Government, at pages 5 and 6 of its brief, cites five cases during the course of its short argument. Not one of them sustains the Government's position.

The earliest is Tatum, decided in 1951. In Tatum, this Court laid down the following rule. (88 App.D.C. at p. 391, 190 F. (2d) at p. 617):

> "We do not intend to characterize the case for the defense as either strong or weak. That is unnecessary, for in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own." (Emphasis supplied.)

Former Chief Judge Miller, in his comment on Tatum, in McDonald v. United States, decided October 8, 1962 (not yet reported), said (slip opinion page 24): -

> "In the Tatum case, this court said: 'In essence, however, the entire defense (of insanity) rested upon appellant's insistence that he remembered nothing of what happened at the time the offense was committed.' Tatum's trial counsel did not request, and the trial court did not give an instruction on insanity, and the omission was not urged as error on appeal. But this court, acting under the 'plain error' rule, held the instruction should have been given because the issue was raised by Tatum's statement that he did not remember committing the crime." (Emphasis supplied.)

In other words, Tatum is no support for the Government here; it is directly the opposite. In Tatum, the trial judge ruled that Davis had not been satisfied; this can be no authority for a reversal of a trial judge who rules that Davis has been satisfied.

Further, the language and the general principle in Tatum are dispositive, on the merits, of the correctness of Judge Keech's ruling in the present case.

The next case cited by the Government is Wright, decided in 1954. In this case, like Tatum, the trial judge ruled that Davis had not been satisfied. This Court affirmed his ruling. Judge Edgerton wrote (94 App.D.C., at p.

309, 215 F.(2d) at p. 500) : -

> "The issue of sanity is not raised by the mere statement of a defendant that he does not remember what he did when he was drunk." (Emphasis supplied.)

The next case cited by the Government is Lebron, decided in 1955. Here this Court specifically approved the rule of Tatum, but affirmed the conviction because (97 App.D.C. at p. 136, 229 F.(2d) at p. 19): -

> ". . .the appellants themselves flatly refused to rely upon insanity as a defense." (Emphasis supplied.)

and defense counsel conceded the issue of sanity. The question of satisfying the requirements of Davis never appeared in the case.

The next case cited by the Government is Wilson, decided in 1960, a case upon which the Government "chiefly relies". (See Brief, Table of Cases).

In Wilson, there was no testimony except the statement of the defendant that the accusations against him were "ridiculous" and that

> "to me it had to be some sort of temporary insanity. . ." (109 App.D.C. at p. 337, 288 F.(2d) at p. 121)

Here the defendant's counsel requested no charge and the trial judge gave no charge; i.e. ruled that Davis had not

been satisfied, the antithesis of the present case. This Court affirmed.

Finally, the Government cites McDonald, decided October 8, 1962. Again, this is a case upon which the Government "chiefly relies".

The trial judge in McDonald, like Judge Keech in the present case, held that Davis had been satisfied. All nine judges, sitting en banc, agreed on a reversal because the trial judge's charge, on the insanity issue, was inadequate and prejudicial to the defendant (the exact claim made in the present case, although the error in McDonald was on a different point).

Just as in the present case, the Government argued:

> ". . .that the evidence was insufficient to require an instruction on responsibility, hence any defects in the instruction are immaterial." (Slip opinion p. 3)

This Court then demolished the Government's argument in the present case, by restating the Davis - Tatum rule in these words (slip opinion pages 3-4):

> "Under Davis . . .if there is 'some evidence' supporting the defendant's claim of mental disability, he is entitled to have that issue submitted to the jury. Under Durham. . .evidence of a 'mental disease' or 'mental defect' raises the issue. The subject matter being what it

> is, there can be no sharp quantitative or qualitative definition of 'some evidence'. Certainly it means more than a scintilla,[2/] yet, of course, the amount need not be so substantial as to require, if uncontroverted, a directed verdict of acquittal.[3/] The judgment of the trial judge as to the sufficiency of the evidence is entitled to great weight on appeal, but, since the defendant's burden is merely to raise the issue, any real doubt should be resolved in his favor.[4/] (Emphasis supplied.)

At footnote 3/, in the above quotation, this Court cited Tatum with approval. At footnote 4/, this significant statement appears:

> "In considering the quantum of evidence necessary to raise the issue of criminal responsibility, we cannot ignore our experience that in most cases the accused does not possess the knowledge and financial ability required to seek and obtain expert testimony in his behalf. Ordinarily such persons can only obtain examinations by psychiatrists employed in government institutions, and if these examinations are inadequate, 'the (resulting) inadequacy of the evidence is not a point in favor of the prosecution'." (Emphasis supplied.)

The above quotations, which appear in Part I of this Court's opinion in McDonald, were affirmatively approved by Judges Danaher and Bastian in their concurring opinions. (Slip opinion pages 9-10) Chief Judge Miller agreed with Part I "in the main", but wanted Tatum overruled, a position which was not supported by any of the

other eight judges.

The result is that the rule of this Court, stated only four months ago by eight members of the full tribunal, is that -

(1) the judgment of the trial judge as to the sufficienty of the evidence under the Davis rule is entitled to great weight;

(2) any real doubt should be resolved in favor of the defendant.

We ask nothing more than the application of that rule to the present case.

Respectfully submitted,

PHILIP W. AMRAM, ESQ.
944 Washington Building
Washington 5, D. C.
Attorney for Appellant by
appointment of this Court.

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,442

HORACE SIMPSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEX

JOINT APPENDIX

[Filed July 20, 1961]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled on June 29, 1961, Sworn in on July 5, 1961

THE UNITED STATES OF AMERICA	)	Criminal No. 580-61
	)	Grand Jury 744-61
	)	Assault With a Dangerous Weapon
vs.	)	(22-502 D.C. Code)
	)	Assault With Intent to Kill
HORACE SIMPSON	)	(22-501 D.C. Code)

The Grand Jury charges:

On or about April 12, 1961, within the District of Columbia, Horace Simpson made an assault on Mary V. Simpson with a dangerous weapon, that is, a hard, sharp instrument, a more exact description of which is unknown to the Grand Jury.

SECOND COUNT:

On or about April 12, 1961, within the District of Columbia, Horace Simpson made an assault on Mary V. Simpson with intent to kill the said Mary V. Simpson.

/s/ David C. Acheson
Attorney of the United States
in and for the District of Columbia.

A TRUE BILL:

/s/ Charles E. Sando
Foreman.

[Filed September 1, 1961]

ORDER

Upon consideration of the motion by defendant through his counsel, for an examination of the mental competency of the defendant, pursuant to Title 24, Section 301, of the District of Columbia Code, as amended August 9, 1955, and the representations made in support thereof, it is this 1st day of September, 1961,

ORDERED, that the defendant be and he is hereby committed to the Saint Elizabeths Hospital for a period not to exceed ninety (90) days for examination by the psychiatric staff of that hospital and that after such examination a report be made to this Court as to:

(1) Whether the defendant is presently so mentally incompetent as to be unable to understand the proceedings against him or to properly assist in the preparation of his defense herein; and

(2) Whether the defendant, at the time of the alleged criminal offense, committed on or about April 12, 1961 was suffering from a mental disease, or defect, and if so, whether his criminal acts were the product of his mental condition; and it is

FURTHER ORDERED, that in the event there is no bed immediately available at Saint Elizabeths Hospital the defendant remain in the District of Columbia Jail to await transfer to Saint Elizabeths Hospital when a bed becomes available, and it is

FURTHER ORDERED, that upon receipt by the Court of the report of the Superintendent of that hospital, the United States Marshal, or his designated deputy, is hereby authorized to bring the defendant, HORACE SIMPSON before this Court for such further proceedings in this matter as may be necessary, or, in the event the hospital report indicates that the defendant is competent to stand trial, the United States Marshal, or his designated deputy, is hereby authorized to transport the defendant to the District of Columbia Jail to await further action of this Court.

/s/ Frank R. Cook
Attorney for the Defendant

/s/ Joseph C. McGarraghy, Judge

No Objection: /s/ Harold H. Titus, Jr.
Assistant United States Attorney

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SAINT ELIZABETHS HOSPITAL
WASHINGTON 20, D.C.

82,107

In Reply Refer To JHP/MMP
Horace Simpson

November 29, 1961

The Clerk
Criminal Division
United States District Court
for the District of Columbia
United States Courthouse
Washington 1, D.C.

Dear Sir:

Mr. Horace Simpson (Criminal Number 580-61) was committed to Saint Elizabeths Hospital on September 1, 1961, for a period not to exceed ninety days, upon an order signed by Judge Joseph C. McGarraghy, to be examined by the psychiatric staff of this hospital. It was further ordered that a written report be submitted to the Court regarding the patient's mental condition, mental competency for trial, mental condition on or about April 12, 1961, and causal connection between the mental disease or defect, if present, and the alleged criminal acts.

Mr. Simpson's case has been studied since the date of his admission to Saint Elizabeths Hospital and he has been examined by qualified psychiatrists of the medical staff of this hospital as to his mental condition. On November 27, 1961, Mr. Horace Simpson was examined and his case reviewed in detail at a medical staff conference. We conclude, as the result of our examinations and observation, that Mr. Simpson is mentally competent to understand the nature of the proceedings against him and to

consult properly with counsel in his own defense. We find no evidence of mental disease existing at the present time nor on or about April 12, 1961. He is not suffering from mental deficiency.

Sincerely yours,

/s/ Winfred Overholser, M.D.
Superintendent

Enclosure

cc: United States Attorney
for the District of Columbia
Washington 1, D.C.

United States Marshal
United States Courthouse
Washington 1, D.C.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1 Washington, D.C.
March 21, 1962

BEFORE THE HONORABLE RICHMOND B. KEECH, United States District Judge, Trial.

* * * * *

5 MARY SIMPSON

called to the stand on behalf of the government, being duly sworn, was examined and testified as follows:

BY MR. MURPHY: [DIRECT EXAMINATION]

* * * * *

Q. And are you married? A. Yes, I am.

Q. What is the name of your husband? A. Horace Simpson.

Q. Is your husband the defendant in this case, the man seated next to counsel? A. Yes.

* * * * *

6 Q. Do you realize that you do not have to testify in this case against your husband, Horace Simpson? A. I do.

Q. Do you desire to testify in this case against your husband, Horace Simpson? A. Yes, I do.

* * * * *

7 Q. Were you employed on the 12th of April of last year? A. Yes, I was on my way to work that morning.

Q. Where did you work during that period of time? A. The Hot Shoppes, Marriott Hotel.

Q. Where is that located? A. Across the 14th Street Bridge.

Q. What time did you get up on the morning of April 12th of last year? A. I would say around 5:30.

Q. What did you do after you got up? Where did you go? A. I left my apartment and went next door to ask Miss English to watch the kids for me that day because I was on my way to work and she told me she was going up as soon as she finished dressing and I left and I was almost on the corner --

Q. What corner? A. The corner of 4th Street.

8 Q. Fourth and what? A. Fourth and L.

Q. Is that within the District of Columbia? A. Yes.

Q. All right. Did anything unusual occur at that time? A. Yes. I was standing there asking John the best way to get to 12th and Pennsylvania.

Q. Asking who? A. John Taylor. And he was trying to tell me what bus to catch to get to 12th and Pennsylvania. And while he was trying to tell me what bus to get, I saw my husband driving down 3d Street and he saw me and he jumped out of the car and I tried to run from him but I couldn't run. So he pushed me against the fence and cut my throat.

Q. Did you see what he had in his hand? A. No, I didn't see what.

Q. Then what happened? A. I was standing there and I was

holding -- had put my hand up to my throat and I saw the blood and I tried -- I made it across the street and I was sitting in front of Mr. John's Market and John was telling me, after he realized I had been cut, John was telling me --

9 THE COURT: No, you can't tell what he told you. That is hearsay. What happened then?

THE WITNESS: I made it across the street and I was trying to get up to move and everybody was telling me to be quiet.

BY MR. MURPHY:

Q. Did you have any weapons or instruments in your hand at the time that you saw your husband? A. No, I didn't have anything in my hand.

Q. Did there come a time when you went to the hospital? A. I went there Wednesday morning.

Q. That same day? A. Yes.

Q. What hospital did you go to? A. I went to Freedman's Hospital.

Q. How long were you there? A. I was there about three weeks.

Q. Were you there for treatment for the injuries that you received on that morning? A. Yes.

Q. Did your injuries have any effect upon your voice? A. I lost my voice.

Q. For how long a period of time? A. For two weeks.

10 Q. Would you please -- Your Honor, may the witness approach the jury box and indicate the scar on her throat?

THE COURT: Yes, sir, she may.

BY MR. MURPHY:

Q. Would you please step down here. First, prior to the morning of April 12 of last year, did you have any scar or injury on your throat? A. No.

Q. Would you please indicate to the Ladies and Gentlemen of the Jury the area of your throat which was cut that morning? A. Right here.

Q. They have to be able to see. A. The scar right here.

Q. Would you please step back down here and show the jurors also. A. Yes, right here.

Q. All right. Would you please resume the witness stand? A. Yes.

A. Directing your attention to approximately two weeks after you came out of the hospital, did there come a time in which you received a telephone call from your husband? A. Yes.

11 Q. Did you recognize the voice on the phone as that of your husband? A. Yes.

Q. Did your husband, the defendant, indicate where he was? A. He told me he was some place in New Jersey.

Q. Did you have any conversation concerning the events that had occurred on the morning of the 12th? A. Yes. I told him I just got out of the hospital.

Q. You have to keep your voice up. A. I told him that I just got out of the hospital that following week and I asked why did he do it and he told me he didn't know why he did it. He told me he was sorry he did it.

Q. He indicated that he was sorry? A. Yes.

Q. When did you next see your husband? A. July 1.

Q. Where was that? A. It was across the street from -- on Bates Street, Northwest.

Q. What did you do when you saw your husband? A. I went in the

12 house and called Det. Magruder.

MR. MURPHY: I have no further questions.

CROSS-EXAMINATION

BY MR. KAY:

Q. Mrs. Simpson, you say you have been married since 1956? A. Yes.

Q. Between 1956 and three weeks before April 12 of last year, where were you living? Were you living in one house or different houses? A. We were living in different houses.

Q. Who were you living with? Say, between 1956 and March 1961? A. We lived at 80 K Street with his sister and then we moved from there to 8th Street, Northeast, and from there I think we moved out on Farragut Street, Northeast.

Q. You were living with Mr. Simpson all of that time, is that correct? A. Yes.

Q. And was he employed during that time? A. Yes.

Q. And he provided you with the money, is that correct? A. Yes.

13 Q. You say you have five children. Mrs. Simpson, how old are the children? A. Erick is seven, Michael is -- you mean the ones that I had by him?

Q. Approximately the ages of them. A. Erick is seven. Michael is five, Rodney is four, Derrick is two and a half.

Q. How old is the other one? A. The oldest one is 12.

Q. You mentioned on April 12, Mrs. Simpson, that the children were with the baby sitter. Is that correct? A. No, she wasn't the baby sitter.

Q. Where were the children on April 12 when you were out on the corner? A. I left the kids at home and I went next door to get the baby sitter to tell her I was on my way to work.

Q. And the children were by themselves, is that correct? A. Yes.

Q. And where -- you say you went next door to the baby sitter? A. Yes.

14 Q. And after you left the baby sitter, is that when you proceeded to 4th and L Streets? A. Yes.

Q. When you left, as far as you knew, the baby sitter had not gone next door, is that correct? A. No.

Q. And what is the name of the baby sitter, Mrs. Simpson, or who was the baby sitter at that time? A. Mrs. Mildred English.

Q. Mrs. English? A. Yes.

Q. Mrs. Simpson, in the time that you have known Mr. Simpson, have you at any time been aware of any --

THE COURT: Suppose you come to the bench.

(Bench Conference.)

THE COURT: You have made no opening statement but you have indicated to the court that you still raise the issue of mental capacity.

I think this would be beyond the scope of the direct examination but if you want to make her your witness I will certainly permit it.

MR. KAY: Very well.

(End of Bench Conference.)

15 BY MR. KAY:

Q. Mrs. Simpson, on April 12, when this happened, approximately what time was it? A. I don't know the exact time.

Q. Was it in the morning or afternoon? A. It was around -- I would say around 6:00 o'clock in the morning.

Q. 6:00 o'clock in the morning? A. Yes.

Q. You stated you did not -- you were talking with Mr. Taylor? A. Yes.

Q. And who is Mr. Taylor, a friend of yours? A. Yes.

Q. Is he a friend of Mr. Simpson's also? A. Yes, he knows him.

Q. When you first saw your husband he was in an automobile, is that correct? A. Yes.

Q. Was the automobile moving when you saw him? A. He was driving down the street when I first saw him.

Q. Towards your direction, is that correct? A. Yes.

16 Q. Did he stop the automobile in front of you? A. Yes.

Q. Do you recall his exact actions when the automobile came to a stop? A. He jumped out.

Q. And did he run towards you? A. Yes.

Q. Did he say anything at that time? A. I didn't hear.

Q. Did he say anything at that time? A. No, he didn't say anything to me.

Q. Is it correct to say that he didn't say anything to you that morning? A. I don't remember.

Q. Did he say anything that morning? Did he have any conversation with you? A. No, I don't remember him saying anything at all to me.

Q. After all of this happened, did you notice or see what he did? A. No, I didn't.

* * * * *

17 JOHN R. TAYLOR

was called on behalf of the government, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

18 BY MR. MURPHY:

Q. Keep your voice up. State your name and address. A. John R. Taylor. 310 L Street, Northwest.

Q. Are you employed? A. Yes, sir.

Q. Where? A. Drug Fair.

Q. In what capacity? A. Driver.

Q. Now, directing your attention to April 12 of last year, at approximately 5:30 to 6 in the morning, do you remember where you were? A. Yes, sir.

Q. Where were you, sir? A. I was on the corner of 4th and L waiting for the time to go to work.

Q. Do you know Mary Simpson? A. I do.

Q. Do you know Horace Simpson? A. Yes, I do.

Q. How long have you known the Simpsons? A. I have known them for approximately a year.

19 Q. That was a year as of April? A. A year prior to April.

Q. Now, did there come a time in which you saw Mary Simpson on that morning? A. Yes.

Q. What were the circumstances? A. She was asking me how to get to where she transferred to get a -- to the Marriott Hotel. She was going to work over there and that was her first day and she was asking me what bus to catch and how to get there and I in turn was trying to explain to her how to get there.

Q. Did anything unusual occur at that time? A. I would say so.

Q. All right. Would you relate to the court and the jury what happened? A. Well, in between the time that I was trying to explain to her how to get this bus, she threw up her hands and started to run and just about that time I looked up and I saw this car stop. This car jammed on

on its brakes and Simpson jumped out of the car and he had this razor in his hands and so she ran about -- I guess from about here to the back of the court room and she stopped and I seen him put his hands around her as if he was trying to choke her.

20 MR. KAY: If Your Honor please --

THE COURT: Just tell us what you saw, sir. What did he actually do?

THE WITNESS: Actually he chased her and when he caught her he put his hands on her neck.

BY MR. MURPHY:

Q. Would you demonstrate with your hands how his hands appeared on her throat? A. Well, both hands. In other words, facing me both hands were around like this and so then he walked away and got back in his car and pulled off and by that time I seen her move her hands and blood.

Q. Then what did you do? A. Well, she went across the street and started to run. I hollered at her and told her not to run because if she run it would make her bleed more and she sat on the steps of a store.

Q. Did you ever examine her neck? A. No, I never.

Q. Did you ever look at it? A. No.

Q. Did you observe anything unusual about her person when you went over to her? A. Yes. She was bleeding and her dress was bloody

21 and she had a blue dress on.

Q. Bleeding whereabouts? A. From her neck.

Q. Then what happened? A. Well, then we called an ambulance and the police arrived first.

Q. Was there any other person present at that time, if you know? A. Well, it was quite a few people present, I mean, standing around.

Q. Can you describe in more detail the instrument you saw in the defendant's hand? A. I saw a straight razor.

Q. Do you have any recollection as to the color? A. I would be afraid to say but I think --

Q. Well -- A. I saw the blade but the color I couldn't very well tell you.

MR. MURPHY: I have no other questions.

CROSS-EXAMINATION

BY MR. KAY:

Q. Mr. Taylor, you said you had known the Simpsons about a year.
22 Do you know where they were living, sir? A. You mean during the time that I was --

Q. Yes, sir. A. They were living on fourth Street.

Q. Now, the morning of April 12, you say you saw -- you were talking to Mrs. Simpson. Could you describe exactly what happened when you first saw the automobile being driven, you say, by Mr. Simpson? A. What made me notice the automobile, she broke and ran first before I could get finished explaining to her and just about that time the automobile came up and to a stop about as close to me as this stenographer sitting here.

Q. Was that the first time you saw the automobile? A. That was the first time I saw the automobile.

Q. At that point what did you see Mr. Simpson do? A. Mr. Simpson -- the car came -- the door came open and Mr. Simpson jumped out and he ran up the street after his wife and he caught her at the fence.

Q. What would you say would be the time lapse from seeing the automobile and Mr. Simpson catching up with his wife? A. Just a matter of seconds.

Q. Now, during the whole time this transaction was taking place,
23 you stated to Mr. Murphy that you didn't hear Mr. Simpson or Mrs. Simpson say anything? A. No, I didn't.

Q. No words took place between either of them? A. As far as I could hear, no words.

Q. You say there were other people around that time in the morning. Were any of them people that you knew by name? A. By name, yes, I knew. It was Hezika Baxter and I know Oliver. As a matter of fact, there were quite a few people there on that corner and that is the corner where quite a few fellows try to catch a job as far as jobs are concerned.

MR. KAY: That is all I have.

THE COURT: All right, sir, you may step down.

MR. MURPHY: Just one question.

REDIRECT EXAMINATION

BY MR. MURPHY:

Q. Do you see Horace Simpson in the court room today and if so, would you please point him out? A. Yes, there.

MR. MURPHY: May the record reflect the witness indicated the defendant?

THE COURT: Yes, sir.

24 HEZIKA BAXTER

was called as a witness on behalf of the government, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MURPHY:

Q. Sir, in a loud clear voice, what is your name? A. Hezika Baxter.

Q. Where do you live, Mr. Baxter? A. 313 L.

Q. Are you employed? A. I am.

Q. Whereabouts? A. Giant Food.

Q. How long have you been employed by Giant Food? A. Nine months.

Q. Now, directing your attention to April 12, last year, approximately 5:30 or 6:00 o'clock in the morning, do you remember where you were? A. Yes, I do. Yes, I sure do.

Q. Do you know the defendant in this case, Horace Simpson? A. Yes.

25 Q. Did you know him at that time? A. I seen him.

Q. Did you know Mary Simpson, his wife? A. I seen her.

Q. Did you see Mary Simpson on that morning? A. I did.

Q. Would you relate the circumstances? A. Well, she walked up to Taylor and asked him which is the best way to get to --

MR. KAY: I object.

THE COURT: You heard Mrs. Simpson talk to Taylor on that morning. Is that what you said?

THE WITNESS: I was standing there and she asked him --

BY MR. MURPHY:

Q. What happened, not what Mrs. Simpson said. A. This car came down the street and she saw the car and she broke backwards towards the house running and he pulled the car --

Q. Who is he? A. That fellow there.

26 Q. The defendant? A. Yes.

Q. All right. A. And he jumped out of the car and caught her and he caught her. He didn't say a word whatever and I don't know what it was, a razor on the side of the neck and that was it and turned around and got back into the car.

Q. What did you do? A. I ran in the house and called the police and then I went back out to her.

Q. Did you observe anything unusual about her physical appearance when you saw her? A. Yes.

Q. What did you observe? A. Her throat was cut clean across here.

Q. Was she bleeding? A. She was bleeding, yes.

Q. Then what did you do? A. I held her in my arms until the police got there and the first aid kit and then she collapsed then.

Q. Where did the defendant go after this incident with his wife?

27 A. He got in the car and pulled off.

Q. Did you hear any conversation between the defendant and his wife, Mary Simpson? A. No, he never said a word.

Q. How far away were you at the time of the cutting? A. About from here to that bench.

Q. From here? A. About here to you.

Q. Approximately 20 feet? A. Yes.

MR. MURPHY: I have no other questions.

CROSS-EXAMINATION

BY MR. KAY:

Q. Mr. Baxter, you say Mr. Simpson ran off without saying anything? A. Yes.

Q. Isn't it true that you saw Mr. Simpson had both hands -- A. I saw one hand like this and the other -- whatever he had in the other hand by the side of her neck.

Q. You only saw one hand up against her neck? A. Yes, one hand.

* * * * *

28 WILLIAM R. OLIVER

was called to the stand on behalf of the government, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MURPHY:

Q. Sir, what is your name and address? A. William R. Oliver.

Q. What is your address? A. 308 K Street, Northeast.

Q. Now, sir --

MR. KAY: Could I ask the witness to repeat?

THE COURT: Yes.

THE WITNESS: William R. Oliver. 308 K Street, Northeast.

BY MR. MURPHY:

Q. Directing your attention, Mr. Oliver, to April 12 of last year between 5:30 and six in the morning, do you remember where you were? A. I was on Fourth Street, near Fourth and L.

29 Q. And did you see a person named Mary Simpson at that time? A. I did.

Q. Did you know her prior to that time? A. Pardon?

Q. Did you know who she was before April 12? A. I did, yes.

Q. Do you know the defendant in this case, Horace Simpson? A. I do.

Q. Had you known him prior to that day? A. That's right.

Q. How long a period of time, sir? A. Oh, maybe a year or maybe longer.

Q. Now, where did you see Mary Simpson? A. Well, she was coming down Fourth Street and she stopped on the corner at Fourth and L.

Q. Now, did there come a time when you saw her talking with Mr. Taylor? A. I did.

Q. Now, what happened after that? Don't relate the conversation. Did you see anything unusual occur at that time? A. I did.

Q. Would you please relate it to the court and the jury? A. Well,
30 she was talking to this fellow John and this car pulled up and this Simpson got out of the car with some kind of sharp instrument in his hand and she ran about -- I would say 15 or 20 feet and he caught her and pushed her back against the fence and when she saw him she started to holler and put her hands over her face like that and he swiped across the neck one time and got in the car and pulled away.

Q. How do you mean swiped? A. Put a knife or whatever the instrument was.

Q. And then what did she do? A. She put her hands on her neck and walked across the street and I gave her my pocket handkerchief and I saw the blood coming from there, through her fingers and she sat on -- I guess you call it a slab right in front of the store and I think that is the store at 1100 and she sat on that slab and after a while she fell off the slab.

Q. Did she pass out? A. Passed out, fell out on the street, sidewalk.

Q. Now, did she have any injuries at that time? A. No, none that I know of.

Q. Did she have any injuries to her neck? A. No.

Q. Was she bleeding? A. Not until she was cut.

31 Q. Well, after she was cut? A. Yes, she was bleeding.

Q. Where was she cut? A. Neck, throat.

Q. I see. And there came a time in which the police and the ambulance took her away? A. That's right.

Q. Did you hear any conversation between Mary and the defendant Horace at the time he jumped out of the car and he jumped back in and drove away? A. He didn't open his mouth.

MR. MURPHY: I have no other questions.

MR. KAY: No questions.

THE COURT: You may step down.

MR. MURPHY: The government rests.

THE COURT: You may proceed, Mr. Kay.

(Defendant's case transcribed only as to parts bearing on defendant's sanity.)

(Eddie Simpson was called to the stand on behalf of the Defendant, being duly sworn, testified as follows:)

(Excerpt of testimony on direct examination)

32 BY MR. KAY:

Q. Do you know the defendant in this case, Mr. Horace Simpson? A. That is my brother.

Q. Mr. Simpson, have you in the past worked with your brother? A. Yes, I have worked for him several years ago. I worked for him a year or so ago. I worked for him off and on.

Q. During that time, Mr. Simpson, do you know whether or not Mr. Simpson had had black out or fainting spells? A. Well, at the time I worked with him he didn't have any but I --

THE COURT: No, sir. You say at the time you worked with him he didn't have any?

THE WITNESS: At the time he didn't but I heard of several times when --

THE COURT: Not what you heard, sir.

THE WITNESS: At the time I worked with him he didn't.

BY MR. KAY:

Q. When you say you worked with him and he didn't have any, you mean you didn't see any? At the time I worked -- I only worked for a

33 short period of time.

Q. At any other time, did you ever know him to have fainting or black out spells? A. No.

Q. When you say no, do you mean you didn't see any? A. No. Actually I never seen him.

MR. KAY: That is all I have of this witness.

MR. MURPHY: No questions.

THE COURT: You may step down.

(Mr. Horace Simpson took the stand. Reported but not transcribed.)

MORRIS N. PLATKIN

was called to the stand on behalf of the government, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MURPHY:

Q. Doctor, would you please state your name and where you are presently assigned? A. Morris N. Platkin, assigned to the staff at St. Elizabeths Hospital as a psychiatrist.

Q. And what is your training and background?

34 MR. KAY: The defense will stipulate the doctor's qualifications, Your Honor.

THE COURT: I think you might briefly give the jury the benefit of the doctor's background.

THE WITNESS: I had a year's rotating internship at St. Elizabeths Hospital and following that I took a three years residency in psychiatry and then I went on the staff of St. Elizabeths Hospital and I have been there ever since. I have been on the staff of St. Elizabeths since 1954.

BY MR. MURPHY:

Q. And what is your present assignment over there, by title and definition? A. At the present time I am in charge of the maximum security division of the hospital, that is, John Howard Pavilion.

Q. Is that the section of the hospital where persons awaiting trial are kept for purposes of mental examination? A. Yes, all male patients.

Q. Directing your attention to September 1, and the period subsequent to that time, did there come a time in which the defendant Horace Simpson came to St. Elizabeths Hospital for the purpose of a mental

examination? A. Yes, sir.

35 Q. And was he attached to your ward or division? A. Yes, sir, he was on the service in the John Howard Pavilion, the maximum security service of the hospital.

Q. And did there come a time in which he came to your personal attention and you knew he was there? A. Yes.

Q. Did you know the reason why he was in St. Elizabeths Hospital? A. Yes.

Q. And did you know the nature of the criminal charges he faced at that time? A. Yes.

Q. What were they? A. Our records reflect that he was charged with assault with a dangerous weapon, with assault with intent to kill.

Q. Did the records indicate the alleged victim was his wife? A. Yes, it did.

Q. Did there come a time in which the staff of St. Elizabeths Hospital undertook to psychiatrically examine this defendant to determine his mental condition as of the date of the alleged crime, that is, April 12, 1961?

36 A. Yes, sir, and that took place on November 27, 1961.

Q. Did you personally examine the patient during -- between the period of September 1 until the November date you just mentioned? A. Yes.

Q. How many times? A. I can't give you any estimate as to how many times I had seen him. Not very frequently but I did participate in this medical staff conference where I spent most of the time with him.

Q. Did you have any information from the defendant or other sources that the defendant may have suffered certain black out or fainting spells? A. Yes, sir, he so advised us.

Q. You took that advice into your consideration when you reached the results of your staff conference? A. Yes.

Q. Who was present at the staff conference? A. There was Dr. Owens who is clinical director of the service, Dr. Dobbs and Dr. Hannon who are also staff physicians as well as myself and there were three

resident physicians and there were three psychologists present.

37 Q. The persons attending the staff conference or some of them, conducted personal examinations of the defendant at that time as well as psychologists having conducted certain examinations? A. Yes, that is correct.

Q. And did there come a time in which a consensus was reached at the staff conference as to the mental state of the defendant as of the 12th of April, 1961? A. Yes.

Q. What was that consensus? A. That he was without mental disorder.

Q. Would that also mean that he was without mental disease or defect? A. Yes, without either.

Q. The opinion of the staff is that the defendant was not suffering from any mental illness or sickness? In other words, was he in command of his senses as of the time on the date of April 12, 1961? A. That is our opinion, yes.

Q. Could you explain to the court and the jury the significance of the black out spells alleged by the defendant, if they did in fact occur?

38 A. Well, I don't know the significance. They were reported by Mr. Simpson but we could find no corroborative evidence that he did in fact suffer these things. He may have had brief absence. There was nothing we could determine that would explain them if they did in fact exist.

In other words, he had no condition that we knew that would account for them.

MR. MURPHY: I have no other questions of the doctor.

CROSS-EXAMINATION

BY MR. KAY:

Q. Dr. Platkin, was any one particular doctor assigned to Mr. Simpson? A. Doctors are not generally assigned exclusively to any one patient. Several doctors will see the patient on different occasions but no one doctor exclusively is assigned to handle a case of any patient.

Q. Doctor, you say that you had examined him on different occasions? A. Yes.

Q. You had interviewed him? A. I was specifically vague about that because I do not recall how many times I may have talked to him. The only time that I recall specifically that I had contact with him was

39 at this medical staff conference.

Q. Doctor, was any test performed on Mr. Simpson while over at St. Elizabeths? A. Yes, sir. He had a number of examinations.

Q. Specifically could you tell us? A. Yes. In view of the fact that he described some black outs, we had a neurological examination, a nerve specialist was to examine him because the history of blackouts might suggest epilepsy or brain tumor or some type of brain injury of one kind or another and so we have the nerve specialist examine him and his report was negative. He found nothing.

Q. Doctor, when you say neurological tests, there are complete neurological tests or something less than complete on different occasions? A. I will elaborate, if you would like. In the ordinary course of the routine physical examination we make certain neurological observations but when there is some indication we have to go further than the routine examination and we have a consultant, a specialist in neurology who comes in and makes a much more extensive and intensive examination and such examination was performed.

40 THE COURT: And the result of that, sir?

THE WITNESS: Negative. There was nothing found.

BY MR. KAY:

Q. What other tests did you do? A. He also had skull X-Rays. These are X-rays of the skull to determine any abnormalities or any changes and these were negative, the X-rays were entirely within normal limits.

He also had an electroencephalogram or what is known as a brain wave test. In certain people some times in suffering from certain injuries or disease or abnormal conditions of the brain, if these brain waves are abnormal -- they are simply waves of this kind and they show differences in rate, in attitude, frequency and so forth. The result of this examination was entirely normal.

He had spinal examinations to check his spinal fluid because there was a history of having had syphilis at one time and these examinations were made and they were found essentially to be negative. No evidence of involement of the central nervous system and no evidence they affected his brain or spinal cord, and so this examination was made.

Psychological examinations were made. These are made pretty regularly and they determine the level of the patient's intelligence, they
41 also determine certain characteristics of his personality and a battery of different tests are given to individuals and these reflected an intelligence level which might be called border line. That is not particularly remarkably brilliant but nothing that could be called mentally deficient or defective and there were some evidence of emotional inability and some very, very questionable evidence that there might be some organic brain changes but nothing that could point in any one direction or was specific.

Q. What was the organic -- A. I can't say any further because the indication was -- if they were present at all they were very minimal and would not particularly be of any great significance.

Q. What was the basis for that statement, Doctor? A. These were the psychological examinations and they some times would show organic changes in the brain and the answers to these questions involve not only verbal answers but also reproductive, certain patterns on paper, things of that nature and the way they are done and the way they are set up on paper and the speed in which they are done and the accuracy and so forth and they are interpreted by the clinical psychologists which I am not and the interpretation of these are made and they may indicate a variety of
42 things including the possibility of organic changes of the brain.

Q. Doctor, to your knowledge, do you know whether this defendant could read and write? A. I believe he can. I think he has about a fifth grade education and I think his reading and writing is rather minimal but I don't know for a fact how much he can, if at all.

Q. Doctor, you say you examined the defendant for epilepsy?

THE COURT: Not for, sir. To determine whether there had been epilepsy.

43 BY MR. KAY:

Q. Whether it was present? A. That is true.

Q. When you talk about the examination to see of the presence of epilepsy, did you also examine to see whether there is any epilepsy equivalent? A. The report was submitted to the neurological specialist and it stated that this individual had reported to us that for the past several years he had a series of blackouts. We do not like to be more specific because it would allow the neurologist more leeway and then he can examine whether it is for epilepsy or for any other condition and

43 having made these examinations he found no evidence of any abnormality.

Q. You heard of epilepsy equivalent? A. Yes.

Q. Would you be good enough to explain that to us? A. In certain types of patients instead of having the conventional epilepsy seizure which most people have heard about, people falling down and losing control of their bowels and bladder, in certain types of individuals they have periods when they become extremely disturbed. They don't fall down but they become extremely disturbed, very aggressive, very violent and perhaps destructive. This might last for five minutes and it might last for ten minutes or fifteen minutes. They come on rather abruptly and maybe over a period of a minute and they disappear in pretty much the same way and the patient is completely unaware of such an episode, completely unaware of what happened in that period of time.

Q. Doctor, do you know what the causes of the epileptic equivalent is? A. This is not particularly known. It may have a number of causes. In many instances, no known cause has been found.

Q. Is it possible --

THE COURT: Not possible, sir.

44 BY MR. KAY:

Q. Have you found that trauma can cause this? A. Yes, this has been associated with such attacks.

Q. What are the methods used by psychiatrists to determine epileptic equivalent, Doctor? A. One of the most important, of course, is the history. Almost invariably when an individual presents himself with

this kind of problem he has a history of such episodes in the past and the history, of course, has to be confirmed by relatives, neighbors, friends, doctors who have examined him or other agencies or institutions or other witnesses of such episodes. Additional ways would be the skull X-rays to indicate the possible presence of any brain changes. Now, the skull film do not show the brain itself because the X-rays only reflect substances like bone but it might show shifts in the pattern of an X-ray which would suggest brain changes. The electroencephalogram is extremely used fully in such cases because episodes of this kind or epileptic seizures whether they are of the conventional kind or whether they are equivalent often are lodged in some area of the brain and the electroencephalogram that I referred to a while ago usually shows an abnormal wave pattern coming from some particular area of the brain and that is often helpful.

45 Q. You said usually. Isn't it a fact that occasionally the electroencephalogram does not reflect his? A. Yes, this is quite true. If the area was deep within the brain, for example, in the area of abnormality, if such abnormality were deep seated in the brain or if it was between seizures, it is possible that it might not reflect it but in order to have a reliable history -- you would certainly want a reliable history and some other confirmatory evidence of it.

Q. Would you say, Doctor, it is true, that epileptic equivalent perhaps is one of the most difficult diagnosis to make? A. No, I don't think so. If they are well documented and if there had been several episodes and the description is given and they are fairly accurate, there is confirmatory evidence, they are pretty reliable but in the absence of that, you either have to make an assumption that it might be such an episode or wait until further developments and keep the individual under close observation.

Q. When you say a fairly complete history has to be made, do you know when the neurologist examined Mr. Simpson? A. Yes, September 22, 1961.

46 Q. And do you know what sort of history he had to work with at that time? A. He had the history of blackouts as Mr. Simpson described

and basically that was all that was given to him becuase this was the basis for which the examination was requested.

Q. So his diagnosis there was no epileptic equivalent, that was based on Mr. Simpson's own history to him? A. His diagnosis was not that it was within normal limits. He found nothing abnormal in his total examination.

Q. Is it possible then, sir --

THE COURT: Not possible, sir.

BY MR. KAY:

Q. With that diagnosis, was the neurologist ruling out completely epileptic equivalent? A. I don't know what was in his mind. He was given the history of blackouts which was some lead why we were asking for this examination and finding a normal examination, he had nothing further to offer since he was not in possession of the total picture he had fulfilled his function as making a neurological examination and the problem then was ours to determine.

47 Q. He didn't have a full picture? A. No.

Q. You stated earlier, did you not, to determine epileptic equivalent, you need a full backgound, full history of the patient? A. Yes.

Q. You say in this case he did not have a full picture? A. He was advised there was a history of blackouts and he was then asked to make an examination. This is his job to make a neurological examination. It's a standard examination that he makes with an eye to the information given to see if he can find anything abnormal in the examination and any conclusions made from that would depend on an individual like myself who might be reading his report.

THE COURT: Are you saying in effect, Doctor, that when he sought to examine this man, he had been flagged as to blackouts and that was one thing for which he was being called into the picture?

THE WITNESS: Yes, sir.

THE COURT: Having been called into the picture, he found nothing abnormal?

48 THE WITNESS: That is correct, Your Honor.

BY MR. KAY:

Q. Is a neurologist normally called in to make an examination, Doctor? A. He is called in only where there is some question of organic damage or injury or illness in the central nervous system, the brain or the spinal cord, the nervous system of the body, where we think there might be some occasion where he might find something and we invite his consultation.

Q. Doctor, you mentioned earlier that very often one has to wait to see how a patient would fair. Could you tell us whether or not a person who developed an epileptic equivalent would be able to be diagnosed as such after he recentiy developed the epileptic equivalent? A. Well, this again depends upon an episode of excitement. One certainly would not be an adequate basis for making such a diagnosis because in a period of five or ten or fifteen minutes when a person becomes extremely disturbed and assaultive and destructive, could occur on the basis of anything. An individual could be drunk, he can be irritated, toxic and he can be angry about something and it could occur for numerous reasons but when there are series of such episodes and no basis for them and other

49 factors ruled out, when all of these are ruled out, then there is strong presumptive evidence that he is suffering from an epileptic equivalent. One can never be absolutely one hundred per cent certain unless there is a long recorded history, unless these occurred many times and reliable witnesses have seen them and perhaps you have confirmatory evidence of E.E.G. or some other course or a well recorded history of injury to a specific area of the brain or tumor or something like that and in the absence of anything like that, the best thing you can do is make a presumption.

Q. So, is it true, Doctor, if a person has the first epileptic equivalent, the neurologist in examining that individual would be hesitant to give a diagnosis of epileptic equivalent on the basis of that? A. He might very well be reluctant to give such a diagnosis, yes.

Q. In your examination, Doctor, were you able to give any explanation for the blackout spells or dizzy spells? A. No. They had no specific meaning to me. They were rather vague in description and there was no confirmatory evidence and they were not recorded as to their frequency and whether he knew what happened during these episodes and a person with epileptic equivalent will tell you that he had a blackout and that he discovered later that he had smashed the furniture
50 or beat somebody or had done something terrible and I mean not necessarily destructive but he will give you this or a relative or a friend who observed him have such seizure and they will give you such a report. Collecting material like this may lead to a presumption of a condition of epileptic equivalent.

Q. Are the actions of an epileptic equivalent always violent? A. Not necessarily but this is the way they usually come to your attention because the individual becomes uncontrollable or destructive and somebody or other in the environment feels some examination or control should be exercised and the individual is usually referred to a doctor of a hospital or the policeman if the behavior is too uncontrollable.

Q. Actually there are a number of varieties of epileptic equivalent? A. I don't know if you can call them varieties. It would be the way an individual acts and so forth.

Q. Is there such a thing as abdominal epileptic equivalent? A. I don't know what that term means.

Q. You never heard of it? A. I am not familiar with it.

51 Q. Doctor, who was the neurologist who examined Mr. Simpson? A. Dr. Green.

MR. KAY: That is all I have.

REDIRECT EXAMINATION

BY MR. MURPHY:

Q. Are you familiar with the -- with Dr. Green's qualifications as a neurologist? A. I don't know them exactly but Dr. Green is a consultant at St. Elizabeths Hospital and all consultants are properly qualified before they are accepted as consultants.

THE COURT: Doctor, in sum am I understanding you to say, that in your opinion, that from all the examinations by the doctors in the different fields, you concluded after the staff conference that this man was suffering from no disease or mental defect?

THE WITNESS: That is my position, Your Honor.

THE COURT: Am I also correct in saying that nothing was found objectively which would indicate any disease or defect to be existent and the only thing that caused you to have the neurological examination was because of what had been told to you by this defendant?

52 THE WITNESS: That is correct, Your Honor.

THE COURT: Is there anything further?

MR. KAY: One question.

RECROSS EXAMINATION

BY MR. KAY:

Q. Can you give your opinion, Doctor, and state that Mr. Simpson on April 12, 1961, did not have an epileptic equivalent attack? A. To the best of my knowledge and understanding that is what I stated. No statement that I ever make is so conclusive that in the light of further evidence it can't be modified but what I know, the information available to me and the examinations available to me, that is my position or my opinion at this time

THE COURT: All right, Doctor, you may step down.

MR. MURPHY: The government rests.

MR. KAY: Nothing further.

PROCEEDINGS [Supplemental Transcript of Defendant's Testimony]

HORACE SIMPSON

was called to the stand on behalf of the defense, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KAY:

Q. Mr. Simpson, I want you to speak loudly and clearly. What is your name? A. Horace Simpson.

Q. Are you married, sir? A. Yes, sir, I am married.

Q. And what is your wife's name? A. Mary Simpson.

Q. And was it your wife who testified a short while ago? A. That's right.

Q. And how long have you been married to Mrs. Simpson? A. Since '56.

Q. And do you have children, sir? A. We have four.

Q. Now, up to the time approximately three weeks before April 12 of last year, were you living with your wife? A. Yes, sir, I was.

Q. Was your married life harmonious?

THE COURT: Excuse me, Mr. Kay.

We will recess for five minutes with the same admonition, Ladies and Gentlemen, speak to no one about this case and permit no one to speak to you about this case.

(Whereupon, a short recess was taken.)

BY MR. KAY:

Q. Just before the recess, Mr. Simpson, I asked you, you were happily married, were you not, sir? A. Yes, I was.

Q. Now, about three weeks before April 12, your wife went to live somewhere else, did she not? A. Her grandmother come over from Virginia and she -- my wife had kept asking why didn't -- why wasn't I talking, you know, happy like I usually be and I told --

THE COURT: The question was, Mr. Witness, did your wife leave?

THE WITNESS: That is, Your Honor, if I could --

THE COURT: No, sir. Your counsel will put the questions to you.

BY MR. KAY:

Q. She did leave, did she not? A. Yes, sir, she left.

Q. And why did she leave? A. We had an argument and she called the police and they taken me down to the precinct and that was the time I was at the precinct she left. She taken all the children.

Q. Now, after she left, were you still living at the old address? A. I lived there until that -- what happened on the Friday night. I lived there until Sunday night and I had to move. We were informed that we had to move out. The people we were living with they needed the house right away and so --

Q. Where were you living on April 11? A. At 512 8th Street, Northeast.

Q. Now, on the early morning hours of April 12, Mr. Simpson, would you relate to His Honor and the Ladies and Gentlemen of the Jury what happened as far as you can recollect it? A. I come over in the morning. I had to come to my truck in the morning to get the -- to go to work in the morning. I had informed my wife about this woman taking care of the children. She would get drunk and go away and leave the children. I come in a couple of three times and find my little baby sitting in the middle of the floor. She was somewhere drunk.

Q. Which woman? A. This woman she was getting to take care of the children.

Q. Do you know her name, sir? A. It is Mrs. something. I don't know the last name is and I had begged her not to let her take care of these children because she wasn't taking care of them and I seen the little children looking through the window crying for me and I went to my wife and I couldn't have nothing to harm her with and at that time I just come from the house in the morning with my working tools, that's when I come out of the house, a pencil and a rule or something like that and when I come to my truck to pick up the rest of my tools, I couldn't see that I had anything in the world to harm her with because there was no place where I could get it from.

Q. Do you recall having a razor in your hand? A. Definitely not.

Q. Now, where were you at approximately 6:00 o'clock? A. I
6 was in that neighborhood riding around, six or 6:30, I don't know the exact time. I have to go to work quite early and I remember seeing my wife and I remember going to my wife but harming her, I don't -- I didn't have no motive for harming her. I just wanted to give her the money to take care of the children, to stay with the children and take care of the children.

Q. Prior to that time, Mr. Simpson, to your knowledge, did you ever blackout? A. I have quite a few times.

Q. How often would you blackout? A. Well, see, that is kind of hard to tell. It depends on the conditions and the pressure. In the summer time sometimes I could fall out quite often and in the winter, depending on how I have been taking care in the winter.

Q. How do you know you blacked out, Mr. Simpson? A. Sometime I don't know.

Q. On April 12 when you went up to your wife, did you go up to kill her? A. I didn't go to harm her in any way.

Q. Do you recall what happened after you saw your wife that morn-
7 ing? A. No. When I pulled the car around the corner to pick the other fellow up. we went down to -- when the ride come to the union hall and I started walking back up the street, I started to come back to see if she left the children in the house by themselves and I was trying to see about the children. I need to go to work, too. When I come back I see the police -- the woman said the police had seen me and they were going to shoot me and so I just turned and ran.

Q. And did there come a time when you were arrested? A. Certainly.

Q. And how long after this were you arrested? A. It was two months later, I think.

Q. And at that time did you tell the police everything you knew about this? A. I don't remember telling them too much about it because

I had a terrible attack of this at the time of my arrest.

Q. What, sir? A. I had a -- I fell out at the time. I don't remember telling them too much. I don't really know what he asked me at that time.

Q. You stated that you have blackout spells. Do you know how long you have had those? A. Well, from, I think '54 or '55. I was working at Lake Barcroft, Virginia.

Q. No. At the time this all happened on April 12 of last year, were you employed, sir? Were you working? A. Certainly.

Q. Where were you working? A. For a construction company.

Q. For how long? A. I had been working practically eight or nine years.

Q. Did you own your own automobile at the time? A. No, I didn't.

Q. Since 1954 or 1955, did you ever have -- had you ever been involved in any automobile accidents? A. I have.

Q. And when was that? A. I don't know the exact time. I had a couple of accidents right behind each other because of these same procedures. I had one of those spells and ran into the back of a man's car and that was a couple of years ago. I don't know the exact date.

Q. How many accidents have you had since 1954 or 1955? A. Oh, I don't know. Just two I know of, two.

Q. In any of them were you seriously injured? A. No, I don't drive that fast because I understand that I have them.

THE COURT: Do you still have your permit?

THE WITNESS: No, sir.

THE COURT: Come to the bench, Mr. Kay.

(Bench Conference.)

THE COURT: Do you want to say anything about the permit being revoked?

MR. KAY: I don't know.

THE COURT: I won't go into it then.

MR. KAY: That is all I have.

(End of Bench Conference.)

THE COURT: Mr. Murphy.

CROSS-EXAMINATION

BY MR. MURPHY:

Q. Where were you working at the time? A. Terrell Construction Company.

Q. Did you have a regular job? A. Well, in a way because I do piece work and when it is heavy and they have work for me, I go but piece work is never steady and it be days I don't have any work for me but mostly since the last past eight years, I have been working. I do all the cement work.

Q. Now, when did you leave the city after the cutting? A. I don't know.

Q. Well, when do you next remember after you say you came back and you say a woman told you the police were going to shoot you and then you left. Where did you go? A. I don't know. I was -- we was getting ready to go to work on this truck and this car didn't belong -- this car belonged to someone else.

Q. Well, when do you next remember? A. The next I remember, I was in Maryland. The next I remember I was in Maryland and it started to rain late in the afternoon.

Q. Of the same day? A. Yes. I was laying under a tree. It was in the afternoon sometime and I guess I was laying under a tree and it was wet.

Q. Of the same day? A. The same day.

Q. Now, did you go on to New Jersey or New York? A. Not till some time that night. Some time that night I got a ride.

Q. Why did you go to New York or New Jersey? A. I had to get in out of the rain. I was trying to get a ride either way that I could.

Q. Why didn't you come back to Washington where your job was and your family? A. Well, that's what I wanted to do.

Q. Why didn't you? A. I was sick. At the time I got to New York I was sick. I had to go to the doctor immediately.

Q. What was the matter with you? A. Well, I don't know. I was sick with -- I was suffering with different things.

Q. What were some of the things? A. They were treating me for the symptoms and these spells and heart trouble at the same time.

Q. What was the name of the doctor? A. I don't know the exact name.

Q. What hospital? A. It wasn't a hospital. It was a private doctor.

Q. What was the address? A. I don't know the -- it was Red Banks,
12 New Jersey.

Q. Had you ever gone to a doctor down here for these spells? A. That's right.

Q. What doctor did you go to down here? A. Casualty Hospital.

Q. For these spells? A. Yes.

Q. Were you treated? A. That's right.

Q. What was the treatment? A. I don't know. I don't know what the treatment would be.

Q. You didn't go up to New Jersey or leave Washington because of the fact you cut your wife's throat, is that what you are saying? A. Not because -- I didn't want to run and leave my children for nothing because I didn't know my wife was hurt. If I had known my wife was hurt, I probably wouldn't have went no place.

Q. Did you send any money back to her during the time you were up in New Jersey? A. I was disabled to work at the time I was in New Jersey
13 until almost the time when I called her. She left her phone number with some of my friends.

Q. Did you send her any money from the time you left until you made the phone call? A. I didn't know where to send her money to.

Q. You did not send her any money? A. No, sir, because I didn't know where to send her money to.

Q. You did not send her any money? A. No, sir, because I didn't know where to send her money to at that time.

Q. Did you have a straight razor at -- A. No.

Q. Did you at that time, I mean? A. At that time?

Q. Yes. A. No, I didn't.

Q. What did you shave with? A. I use a safety razor for shaving.

Q. Did you have a red handle straight razor in your tool box or any place else? A. No.

Q. Never had a red handle straight razor? A. No.

14 Q. You do construction work or carpenter work? A. That's right.

Q. Did you have a red handle linoleum knife? A. No.

Q. You had no knife at all in your tool kit? A. No, not that I know of?

Q. Not that you know of? A. That's right.

Q. When you applied for your drivers permit on a renewal basis, did you write on there that you suffered from blackouts? A. Well, at the time I went for my drivers license, I wasn't suffering from. Do you mean at the time -- No, I didn't.

Q. Had you ever put on an official form from any government agency that you suffered from blackout spells? A. No, not that I know of.

Q. Do you know of any piece of written document anywhere that would attest to the fact that you maintained that you had these blackout spells over the past four or five years? A. Yes.

Q. Where? A. At the time I was arrested in two places, in Vir-

15 ginia and in the District and I suffered with these spells and a number of people had seen me actually have these spells and at the time I didn't even know I had them.

Q. Your brother said he never saw you have any spells. A. Well, see, my brother do different type of work than I do. These spells come from overheated, over strained. My type of work is awful hard work.

Q. Were you over heated the morning you cut your wife's throat? A. I couldn't say at that time because I was carrying an awful strain for my children. You see your little children crying for you and locked in the house some place and you can't do nothing for them.

Q. Did you see them crying for you that particular morning? A. I certainly did.

Q. Didn't you take all the clothing of those children away and at the time you and your wife separated and wouldn't give her a single piece of clothing for those children? A. I most certainly did not. My wife left and left all the clothes there and I waited until Sunday night, tried to wait until she come back and get the clothes and she understood very well that
16 we had to move from this place and I had no place to store any clothes.

Q. You didn't give the clothes to her so she would have them, the person that had the children, did you? A. I didn't know definitely where my wife was at the time.

Q. If you didn't know where your wife was, how did you know where the children were looking out the window crying for you? A. This was later. She moved the children from where she was back into one door up from where we were living.

Q. You called her the night before you cut her throat and she wanted to get the clothes back because the children didn't have any clothes, isn't that so? A. She did not call me the night before.

Q. You called her? A. I called her?

Q. That is correct. A. I couldn't have called her because I didn't know her phone number.

Q. You knew where she lived and you had all the children's clothes?
17 A. I had --

Q. Yes or no. A. I had a perfect right to take care of my childrens --

Q. Answer my question, sir. Did you have all the childrens' clothes? A. Yes, I had to take them with me when I moved.

Q. She had the children for three weeks and she didn't have any clothes. Is that correct? A. I offered --

Q. Yes, or no, sir. A. Yes, I had the childrens' clothes.

Q. And your wife moved out the night that the police came and took you away down to the precinct? A. That is right.

Q. And she had not lived with you since that time? A. That is right.

Q. Did you know a Mr. Kelly? A. Certainly I know him.

Q. Did you have a conversation with Mr. Kelly during the period of time your wife left before you cut her throat and he told you to leave her alone? A. I did what Mr. Kelly told me to do.

18 Q. Mr. Kelly told you to leave her alone, didn't he? A. I left her alone completely. I didn't bother her.

Q. Except for cutting her throat?

You remember that morning driving down the street where she was, is that correct? A. Sir, I did not cut her throat.

Q. Do you remember driving down the street in your automobile? A. I wasn't driving down the street.

Q. Do you remember being in an automobile that morning? A. I put my tools from this truck into this car to take them around to the place where we get together to go to work.

Q. Did you see your wife standing on the street that morning? A. Certainly. She was talking to this lady upstairs when I went to give her some money for the children.

Q. Did you ever see Mr. Taylor, Mr. Baxter or Mr. Oliver that morning? A. I never seen either one of them.

Q. Standing there at that time? A. No, sir.

19 Q. You admit the morning that your wife's throat was cut, you saw her on that street? A. Certainly.

Q. Did you go up and give her some money? A. I went to give her money.

Q. Did you give her money? A. No, sir. She went away from me. I don't know which way she went.

Q. And you just turned and walked away? A. That's right.

Q. You remember everything then that happened, don't you? A. No, I don't remember she being hurt.

Q. Well, there is no period of time that you don't remember. You are just saying that you didn't cut her throat, isn't that correct? You remember walking up to her and having this conversation about the money, she leaving and you going back around the corner with your friends, don't you? A. We didn't have a conversation about the money because when I went to her, she left.

Q. What part don't you remember? A. I don't remember anything after she pulled away from me.

20 Q. Didn't you testify that you walked around the corner and joined one of your friends or went around there on the next block and later on came back? A. That I walked with who around the corner? I don't follow you.

Q. After you saw your wife, where did you go? A. Around the corner to a lunch room.

Q. The lunch room and then later on you started to walk back and someone said the police were looking for you? A. That's right.

Q. Then you do remember what happened from the time your wife ran away from you, she ran away and you walked around to the lunch room, is that correct? A. I don't know. When she left from me, I don't know which way she was gone.

Q. She left but you just walked around to the lunch room, didn't you? A. Down around to the lunch room?

Q. That's right. Is that where you went? A. That is where we leave out to go to work.

Q. So you came up and you started to go and see your wife and she ran away and then you walked around to the lunch room, is that correct?

21 A. Well, that is where we leave out to go to work.

Q. Where did you go after you saw your wife? A. Went around the corner to the lunch room.

Q. All right. Then you remember what happened after your wife turned and ran, don't you? A. No, I don't remember.

Q. How do you know you went to the lunch room? A. Well, we had to go to the lunch room to go to work.

Q. And you went to the lunch room? A. Certainly.

Q. Then you turned and walked back, is that correct? A. I started back because I didn't understand why she had left the children, if she left the children any place alone.

Q. Then you -- A. The children didn't have no place to stay because I was denied the right to take care of them.

Q. We won't go into that right now. You do remember walking up to her on the street and you do remember her running away and you remember going to the lunch room and you do remember starting --A. She did not run away. She just walked away.

22 Q. You remember going to the lunch room and starting back and then seeing the crowd and being told by someone that the police were going to shoot you. You remember all of that, don't you? A. I don't understand. There's a lot of things I just don't understand because when my wife walked away from me, she walked away from me unharmed.

Q. And you continued on to the lunch room, yes or no? A. I don't know. I can't say a lot of things because I do not really know.

Q. Did you collapse on the street? A. A lot of times that I --

THE COURT: The question was, did you collapse at this time, sir?

THE WITNESS: I did later.

BY MR. MURPHY:

Q. Did you fall unconscious on the street? A. I did at the lunch room. I fell completely out at the lunch room. I fell on the truck there.

Q. This was before you came back to find out that the police were going to shoot you? A. That's right, before I come back.

23 Q. Did you -- A. Someone thought that I was dead.

Q. Who thought you were dead? Name some of the persons.

A. Well, I don't actually know all of them.

Q. Just tell us some of them. A. Well, there was Ella B. I don't know the last names. He works for Terrell Construction Company. I don't know the last names because I really don't have no reason to ask them their last names.

Q. Do you know Mr. Baxter, Mr. Oliver, Mr. Taylor? Do you know who they are? A. I know that they are friends names. That's all.

Q. You knew them prior to that time by their first names? A. I seen these people from the time I moved in that area up until I moved out. Just knowing them by their first or last name, I do not know.

Q. Do you know any reason why they would not be telling the truth that they saw you cut your wife's throat? A. Many reasons that I can tell you, because these people in this area, it's the kind of people that is

the perfect frame. My wife denied the right -- she denied telling me that
24 she would take my children. I tried to do the work of three men
why we could have the money for the children.

THE COURT: Do you have any other questions, Mr. Murphy?

MR. MURPHY: No.

THE COURT: Do you have anything further, Mr. Kay?

MR. KAY: No, Your Honor.

THE COURT: All right, sir, you may step down.

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53 AFTERNOON SESSION

(1:45 p.m.)

EXCERPT FROM CHARGE TO THE JURY

* * * * *

THE COURT: In this case there has been little challenge of the facts or acts charged.

In this case the defendant primarily contends that the defendant was not sane at the time of the crime and that his act or acts were the result of his insanity.

The Government, on the other hand, contends that the defendant was of sound mind at the time of the act or, even if he was suffering from some mental disease or defect, that the act was not the result of or caused by any mental illness.

As I have already said to you, in order for you to find this defendant guilty as to either Count One, assault with a dangerous weapon, or Count Two, assault with intent to kill, you must find that the Government has proved each essential element of these particular offenses before you may find the defendant guilty.

Because the issue of the defendant's mental capacity has been raised in this case, you must find that the Government has also proved beyond a reasonable doubt either that the defendant was not suffering from a mental disease or defect at the time of the offense, or, two, if he was so suffering from a mental disease or defect, that the offense was
54 not the product of the said disease or defect.

I shall now instruct you on the law pertaining to insanity in criminal cases.

The law does not hold a person criminally responsible where there is a reasonable doubt as to his mental capacity and his derangement causes him to commit a crime, but it is not every kind of mental derangement or mental deficiency which is sufficient to relieve a person of responsibility for his acts.

On the contrary, a person may suffer a mental abnormality and still be answerable for his unlawful acts.

In order for a person to be relieved of responsibility of crime, by reason of insanity, first, he must have suffered from a mental disease or defect at the time of the offense.

Two, his act must have been the product of that mental disease or defect.

As to the first element, that he was suffering from a mental disease or defect, when I say disease, I mean a deranged or abnormal mental condition which is considered capable of either improving or deteriorating.

When I say defect, I mean a deranged or abnormal mental condition which is not considered capable of either improving or deteriorating, which may be either congenital or the result of an injury or the residual
55 effect of a physical or mental disease.

As to the second element, that the criminal act was the product of the mental abnormality, this simply means that the act resulted from or was produced by or was caused by mental disease or mental defect suffered by the defendant.

To put it another way, that the defendant would not have committed the offense or offenses but for his mental disease or defect.

As an example of this causal connection or relation, if a person at the time of the commission of a crime is so deranged mentally that he cannot distinguish between right and wrong, or, being able to tell right from wrong, he is unable by virtue of his mental derangement to control his actions, then his act is the product of his mental derangement.

Basically, there is a presumption of sanity. Every person is presumed to be sane until the contrary appears.

However, when there is some competent evidence of mental disorder, then the presumption of sanity vanishes from the case, and the burden is upon the Government to prove beyond a reasonable doubt either, one, that at the time of the offense, the defendant was of sound mind, or, two, that if the defendant was suffering from a mental disease or defect,
56 then the offense was -- let me start again, --

Two, that if the defendant was suffering from a mental disease or defect, that the offense was not caused by the mental disease or defect, just as the burden is upon the Government to prove beyond a reasonable doubt all of the other elements of the offense.

If you should find that the Government has failed to prove beyond a reasonable doubt any one or more of the elements of either offense with which he is here charged, then you must find this defendant not guilty as to such count or counts.

If you should find the Government has proved beyond a reasonable doubt each and every one of the essential elements of the two counts

charging him with assault with a dangerous weapon and assault with the intent to kill, but has failed to prove beyond a reasonable doubt that the defendant's acts were not the product of a mental disease or defect, then in such event, your verdict would be not guilty by reason of insanity.

If, however, you should find that the Government has proved beyond a reasonable doubt each and every essential element of the two counts with which he is charged here, and as I have enumerated them for you, and has also proven beyond a reasonable doubt either that the defendant did not suffer from a mental disease or defect on April 12, 1961, or, two,

57 that the offense was not caused by, or the product of, any mental disease or defect from which the defendant may have been suffering, then you may find the defendant guilty of the offense of assault with a dangerous weapon and the offense of assault with intent to kill.

On the issue of insanity there was called in this case a psychiatrist, a person who, by profession, is known as an expert in his particular field, in other words, a doctor specializing in psychiatry.

A person who, by education, study, or experience, has become an expert in any art or science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed, and which is material to the case.

Such witnesses are referred to as expert witnesses.

You should consider the testimony of the expert and weigh the reasons, if any, given for his opinion.

You are not, however, bound by such opinion. You may give to his opinion such a weight as you deem it entitled to receive, and you may reject expert testimony if, in your judgment, the reasons for that opinion are unsound.

You are also, in determining the question of mental capacity, entitled to, and should, give consideration to the defendant's own testimony as to his state of health or mental condition, his manner and demeanor on the stand, his conduct prior to, his conduct at the time of the offense,

58 in the light of all the facts and circumstances, and immediately after the

event, as may be shown by the evidence.

The question of the defendant's mental condition and its causal connection to the offense charged must be determined by you from the facts which you find to be fairly deducible from all of the evidence in the case.

If your verdict in this case should be not guilty by reason of insanity, this means that the accused will be confined in a hospital for the mentally ill until the superintendent has certified and the Court is satisfied that such person has recovered his sanity and will not, in the reasonable future, be dangerous to himself or to others; in which event, and at which time, the Court shall order his release either conditionally or under such conditions as the Court may deem it appropriate.

* * * * *

Your verdict in this case, ladies and gentlemen, will be guilty or not guilty as to Count One, guilty or not guilty as to Count Two, or not guilty as to the two counts by virtue of insanity. Your verdict must be unanimous.

* * * * *

As to the remaining twelve ladies and gentlemen, it becomes your duty to retire to the jury room, select your foreman and determine the guilt or innocence of this defendant on the two counts here charged.

59 To repeat to you, your verdict in this case will be guilty or not guilty as to Count One, guilty or not guilty as to Count Two, or not guilty as to both counts by virtue of insanity.

[Filed May 3, 1962]

JUDGMENT AND COMMITMENT

On this 3rd day of May, 1962 came the attorney for the government and the defendant appeared in person and by counsel, Alan Kay, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of

ASSAULT WITH A DANGEROUS WEAPON;

ASSAULT WITH INTENT TO KILL as charged

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED tnat the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Three (3) years to Nine (9) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ RICHMOND B. KEECH
United States District Judge.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 17,442

HORACE SIMPSON

Appellant

v.

UNITED STATES OF AMERICA

Appellee.

REPLY TO APPELLEE'S POST-ARGUMENT MEMORANDUM

Appellant did not contend in the main brief or in the reply brief, nor at the oral argument, that the Court of Appeals is "conclusively bound" by the trial judge's decision that the Davis rule has been satisfied. We showed convincingly, we thought, that the trial judge had correctly ruled that Davis had been satisfied and that the errors in the charge on insanity were substantial and prejudicial.

We do not contend in this Reply that this Court is "conclusively bound", i.e.helpless to take action. That position may perhaps be taken hereafter by other counsel in another case; it is not material here and will not be pressed.

Our contentions on the Davis point are based on entirely different grounds.

First - we ask this Court to adhere to the rule of Tatum, reaffirmed by this Court as recently as McDonald on

October 8th last. That rule says that a defendant is entitled to an insanity charge if there is "any foundation in the evidence, no matter if it is "weak, insufficient, inconsistent or of doubtful credibility" nor even if the "sole testimony" is that of the defendant only.

Second - we ask this Court to adhere to the further rule of McDonald, that the judgment of the trial judge is entitled to "great weight and that "any real doubt should be resolved in (defendant's) favor".

The Court will recall that the thrust of the Government's oral argument was the rejection of appellant's testimony as "insufficient because it was "weak", because it was "inconsistent" and because it was "of doubtful credibility", the very arguments which the Tatum rule rejects. The Government asked, in effect, that the doubts be resolved in favor of the prosecution, the antithesis of the McDonald rule.

We would re-emphasize that the appellant's testimony here was greater in content than the testimony deemed sufficient in Tatum. We would further emphasize that the rambling, incoherent, sometimes unintelligible version by the defendant of his actions on the day in question, and his appearance, demeanor and behavior on the witness stand, may

have strengthened the trial judge's opinion as to the possible presence of mental defect or disease. These factors, of course, can never appear in cold type in the appellate record. It is, we think, the presence of factors such as these which prove the complete rightness of this Court's Tatum and McDonald rulings, which we urge the Court to follow.

Respectfully submitted,

PHILIP W. AMRAM
Attorney for appellant by
appointment of this Court

I hereby certify that a copy of this Reply Memorandum was duly served upon the appellee by mailing a copy postpaid to Frank Q. Nebeker, Assistant United States Attorney, United States Court House, Washington 25, D. C., this 9 day of April, 1963.

PHILIP W. AMRAM